IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

#19. (ORIGINAL.)

IN THE MATTER

OF

THE APPLICATION OF METROPOLITAN WATER COMPANY OF WEST VIRGINIA FOR A WRIT OF MANDAMUS DIRECTED TO THE HONORABLE SMITH McPHERSON, ACTING DISTRICT JUDGE OF THE UNITED STATES FOR THE DISTRICT OF KANSAS, AND DIRECTED TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND FOR A RULE.

C. F. HUTCHINGS,
Dwight Building,
Kansas City, Missouri;
O. L. MILLER,
Husted Building,
Kansas City, Kansas;
Of Counsel.

WILLARD P. HALL,
Attorney for Petitioner.
New York Life Building,
Kansas City, Missouri.

IN THE

SUPREME COURT OF THE UNITED STATES.

IN THE MATTER

OF

THE Application of METROPOLITAN WATER COMPANY OF WEST VIRGINIA for a Writ of Mandamus Directed to the Honorable SMITH MCPHERSON, Acting District Judge of the United States for the District of Kansas, and Directed to the CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

Now comes the petitioner, Metropolitan Water Company of West Virginia, by Willard P. Hall, its attorney, and moves for leave to file the petition for mandamus hereto annexed; and further moves that an order be entered and issued, directing the Honorable Smith McPherson, acting District Judge of the United States for the District of Kansas, and directing the Circuit Court of the United States for the District of Kansas to show cause why a writ of mandamus should not issue against them and each of them in accordance with the prayer of said petition, and why said petitioner should not have such other and further relief in the premises as may be just and meet.

WILLARD P. HALL,
Attorney for Petitioner, Metropolitan Water Company of West Virginia.

C. F. HUTCHINGS,
Dwight Building,
Kansas City, Missouri;
O. L. MILLER,
Husted Building,
Kansas City, Kansas;
Of Counsel.

4 TO THE HONORABLE EDWARD DOUGLASS WHITE, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Metropolitan Water Company of West Virginia, a corporation duly organized and existing under and by virtue of the laws of the State of West Virginia, respectfully shows:

FIRST.—That petitioner filed in the office of the Clerk of the United States Circuit Court for the District of Kansas, at Topeka, on February 3, 1911, against The Kaw Valley Drainage District of Wyan-
5 dotte County, Kansas, a public corporation organized and existing under the laws of the State of Kansas, and the members of the Board of Directors of said Drainage District, citizens and residents of the District of Kansas, a bill of complaint asking for injunctive relief, temporary and permanent, restraining defendants from taking possession of petitioner's lands, or any part thereof, under an Act of the State of Kansas, approved by the Governor thereof on January 28th, 1911, on the ground that said Act was unconstitutional. A copy of said Act and a copy of said bill of complaint are hereto annexed marked, respectively, "Exhibit A" and "Exhibit B."

SECOND.—That Honorable Smith McPherson,
6 acting District Judge of the United States for the District of Kansas, on February 8th, 1911, issued a restraining order in said case and set the application for temporary injunction down for hearing before the regular judge on February 18, 1911. A copy of said restraining order is hereto annexed, marked "Exhibit C."

THIRD.—That on the last mentioned date Judge McPherson appeared and announced his purpose to act in the place of the regular judge; that Judge McPherson's attention was called by counsel for defendants in said bill of complaint to Section 17 of the

Act of Congress of 1910, creating the Commerce Court, and he was requested to call in two other judges, one of whom should be a Circuit Judge or a Justice of the Supreme Court, to assist him to hear and determine the application for injunction, and that Judge McPherson took under advisement the question as to whether Section 17 of said Act of Congress applied to the matter before him. 7

FOURTH.—That on February 20th, 1911, Judge McPherson, in a written opinion, said that Section 17 of said Act of Congress did apply, and that he, sitting alone, was without power to issue a temporary injunction; but that he did possess the power, sitting alone, to refuse a temporary injunction; that a single judge could not issue a temporary injunction "suspending or restraining the enforcement, operation or execution of any statute of the state" on the ground of its unconstitutionality, but that a single judge could decree such statute to be constitutional and could refuse to issue a temporary injunction; that the question of the validity of the Act of Kansas had not been argued before him and that he would hear arguments on that question and that if, after the arguments, he should reach the conclusion that said Act was valid, he would vacate the temporary restraining order previously issued by him and deny the temporary injunction, in which event the case could be taken by appeal to the Supreme Court, where the act could be "overthrown" by a court "composed of nine justices"; and that if, on the other hand, he should be persuaded that there was *reason* for believing that said act was void, he would designate "two other judges to take part in the hearing of the case and a re-argument will be made and the question determined." 8 9

FIFTH.—That on the argument as to the constitutionality of said Act of Kansas heard by Judge McPherson in accordance with his said petition, counsel for petitioner urged Judge McPherson, in his brief, to call in two other judges to hear the application for injunction and to give petitioner an oppor-

10 tunity to give the notices required by Section 17 of said Act of Congress.

SIXTH.—That on March 6, 1911, Judge McPherson, in a written opinion filed by him, refused to call in two other judges to sit with him in hearing the application for temporary injunction and that he entered a decree vacating the restraining order theretofore issued by him and denying a temporary injunction. Judge McPherson's two opinions were filed by him attached together. A copy thereof is hereto annexed and marked "Exhibit D."

SEVENTH.—Your petitioner is informed by its
11 counsel and believes that Judge McPherson, District Judge as aforesaid, acting as Judge of the Circuit Court of the United States, sitting alone, was wholly without jurisdiction to hear or determine said application for injunction or to do anything in the matter, except to comply with the requirements of Section 17 of said Act of Congress and to call to his assistance to hear and determine said application two other judges, as therein provided, and that the order made by him vacating the restraining order theretofore issued by him and denying the application for injunction should be annulled and expunged from the records of said Circuit Court.

WHEREFORE, your petitioner prays that an order
12 or rule be made and issued by this Honorable Court directing the said the Honorable Smith McPherson, acting District Judge of the United States for the District of Kansas, and directing the Circuit Court of the United States, for the District of Kansas, to show cause why a writ of mandamus should not be issued commanding said Judge and the said Court, and each of them, to annul and set aside said order of March 6, 1911, vacating the restraining order theretofore issued on February 8th, 1911, and denying the application for injunction, and to proceed to call to the assistance of the Honorable Smith McPherson, or such other judge of the Circuit Court as may hear and

determine the application for injunction, two other judges, as provided in said Act of Congress, and for such other and further writ or relief as to this Honorable Court may seem just and meet, and your petitioner will ever pray, etc. 13

Kansas City, Missouri, March 17th, 1911.

WILLARD P. HALL,
Attorney for Petitioner.

STATE OF MISSOURI,

ss.:

County of Jackson,

LEE RILEY, being duly sworn, deposes and says: That he is the agent of the Metropolitan Water Company of West Virginia, the petitioner above named; that the foregoing petition is true to the deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes the same to be true. 14

LEE RILEY.

Subscribed and sworn to before me, this 17th day of March, 1911.

SALLIE A. CREASON,
[SEAL.] Notary Public, 15
Jackson County, Mo.

16 **EXHIBIT A.**

AN ACT

RELATING TO NAVIGABLE STREAMS, AND TO PROVIDE FOR THE APPROPRIATION AND HOLDING OF LANDS NECESSARY FOR THE IMPROVEMENT THEREOF TO PREVENT OVERFLOW.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF KANSAS:

SECTION 1.—When harbor lines have been established by federal authority along navigable streams
17 running through drainage districts now or hereafter organized under Chapter 215, Laws of 1905, and acts amendatory or supplemental thereto, the appropriation of lands for making the improvements provided for in said Act is hereby declared to be necessary for the protection of the health, life and property of the people of the district.

SECTION 2.—The lands so necessary to be appropriated shall consist of all land lying between such harbor lines, together with a strip forty feet wide on the land side of and contiguous to such harbor lines.

18 SECTION 3.—That whenever private parties or corporations claim to own any part of the land so to be appropriated in any such drainage district, having taxable property to the amount of not less than forty million dollars as shown by the assessment roll of the preceding year, and which shall have deposited with the treasurer of the county wherein such land is situ-

ated money to compensate for the appropriation of land necessary for the making of such improvements, the governor, when satisfied that the money so deposited is amply sufficient to make full and adequate compensation for such property so to be appropriated, shall thereupon issue a proclamation declaring that the State of Kansas has taken and appropriated such land, describing the same, and proclaiming that from and after the date of publication of such proclamation said property and the right to possession thereof vests in the State of Kansas. Such proclamation shall be published in the official paper of the county wherein the land so appropriated is situated, and shall be notice to all parties interested that the State of Kansas has taken and appropriated the land therein described; and thereupon the governor shall take and hold possession of said land in the name and on behalf of the state; provided, however, the governor may appoint and designate the board of directors of the drainage district in which such lands are situated as agents of the state to take and hold such possession for and on behalf of and in the name of the state, and the possession of such land by the governor or such agents shall be possession by the state; and the sheriff of the county wherein such land is situated shall, upon the request of the governor or such agent, put them in possession of such property.

SECTION 4.—That from and after the issuing and publishing of such proclamation, any person interfering with the possession of such property by the state or its agent shall be deemed guilty of a misde-

meanor, and upon conviction thereof shall be fined in a sum of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment not less than thirty or more than ninety days, or by both such fine and imprisonment; and the sheriff of the county wherein such land is situated, upon request by the governor, shall remove all persons interfering with the possession of the state or its agent from said land and protect the agent of the state in such possession.

SECTION 5.—That for the purpose of ascertaining whether or not any private person or corporation is the owner of any part of the land so taken, and, if such owner, to provide and secure full and adequate compensation for the appropriation thereof, the attorney-general, upon the publication of such proclamation by the governor, is hereby directed to commence an action in the District Court of the county wherein such land is situated, such suit to be entitled The State of Kansas vs. all persons having or claiming any interest in the land lying between the established harbor line of the .....river and within a distance of forty feet landward therefrom, within the.....drainage district, in.....county. Notice shall be given by publication of the filing of said action, setting forth the nature of said suit and that all such claimants must appear and set forth their claim on or before the date therein named, which shall not be less than forty-one days from the date of the first publication, and that upon their failure so to do a judgment will be rendered therein excluding them from any interest in said land or any part thereof, and enjoining and barring them

from asserting any claim to said land or any part 25
thereof adverse to the State of Kansas. Such publication shall be made in the manner provided for publication notices in the code of civil procedure. If the claimants so notified shall appear in said cause, then said action, as to the parties so appearing, shall proceed to trial as in other civil actions, before a jury, unless such jury be waived, to determine the ownership of said property and to assess the value of the land and other damages for the taking of such portion thereof as may belong to parties other than the public. That in the event the claimants shall fail to appear on or before the date named, a *pro confesso* judgment shall be entered excluding them from any interest in said land, which said judgment shall be- 26
come final and conclusive at the expiration of six months from the date of such rendition unless the claimant shall make application within such period for the vacation of such judgment and permission to defend in said action, and shall show to the court that he had no knowledge or notice of the pendency of said action prior to the rendition of such judgment.

SECTION 6.—That the drainage districts into or through which such navigable stream flows are hereby made liable for the value of any land so appropriated, together with all damages which may be occasioned thereby, to the owner of the land so appropriated, and the cost of said suit, and any judgment rendered in said action against the State of Kansas shall be a lien upon all the taxable property in such drainage district; 27
and the board of directors of such drainage district is hereby empowered and directed to pay said judgment, the cost and award from the funds in their hands and under their control for such purpose, and in the event such funds are insufficient or for any reason may not be used for such purpose, the board of directors shall issue bonds or levy a tax for the payment thereof as provided by law; and in the event that the board of directors of such district shall fail or neglect to pay the full amount of the judgment, cost and award as herein provided, the board of county commissioners of the county wherein such land is situated is hereby em-

28 powered and directed to levy a tax upon all the taxable property within the limits of such drainage district and cause the same to be extended upon the tax rolls and collected as other taxes, in a sum sufficient to pay such judgment, cost and award in full, and the same when so collected shall be so applied; and if for any reason there shall be a failure to satisfy such judgment, the rights of the state to such tract or tracts of land shall be divested and the possession of such tract or tracts of land shall revert to the former adjudicated owners, in which event compensation shall be awarded for any loss or damage occasioned by such temporary appropriation, and the court shall render judgment therefor, which judgment shall be enforceable as in
29 case of permanent appropriation; provided, however, that in any such action it shall be competent for the state to dispute and contest the title of the claimant and to show that the land so appropriated constituted an obstruction or encroachment wrongfully placed in the channel or between the banks of said stream, or that for any other reason the claimant is not entitled to any compensation therefor, and if it shall be found that the land so appropriated constituted an obstruction wrongfully placed in said stream, or that for any reason the claimant is not entitled to compensation or damage therefor, judgment shall be rendered accordingly.

SECTION 7.—That any railroad or railway com-
30 pany having a right of way crossing any of the land so appropriated shall not be deprived of an easement for the use of such right of way, but shall be permitted to retain the right it now has for the purpose of crossing or running along upon or over such levee; provided, however, that such use and occupancy shall not interfere with the widening of such stream and shall not become an obstruction to the flow of the water therein and shall not interfere with the height or otherwise impair the usefulness of the levees to be constructed for the purpose of preventing overflow.

SECTION 8.—That any person having personal property in or upon any land so appropriated shall remove the same within a reasonable time, to be fixed by the agents of the state, and should they fail or neglect so to do such agent may remove the same, or the attorney-general may institute a mandamus suit or suits in any court of competent jurisdiction to compel such removal. 31

SECTION 9.—This Act shall not be construed as a repeal of Chapter 215 of the Laws of 1905 or any statute relating to the matters herein provided for, but as supplemental thereto.

SECTION 10.—The board of directors of such drainage district is hereby empowered to grant easements in or to such forty-foot strip for such use and occupancy as will not interfere with the right of the state to the use of the same for the prevention of overflow, and if at any point along such harbor line the full width of forty feet is not required for the construction of levees or other improvements to prevent overflow, the board of directors of such drainage district may relinquish such part as shall be deemed unnecessary. 32

SECTION 11.—That the remedies provided by other acts relating to the same subject matter shall be held to be concurrent herewith.

33

SECTION 12.—This Act shall take effect and be in force from and after its passage and publication in the official state paper.

34

EXHIBIT B.

IN THE

CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF KANSAS.

METROPOLITAN WATER COMPANY,
Complainant,

vs.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, WM. H. DANIELS, BARNEY POLLMAN, FRED MEYN, F. E. MYERS and G. A. WOODCOCK, Members of the Board of Directors of Said Drainage District.

35

IN EQUITY.
No.....

Defendants.

BILL OF COMPLAINT.

TO THE HONORABLE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS:

Metropolitan Water Company, of the State of West Virginia, presents its bill of complaint against
36 The Kaw Valley Drainage District of Wyandotte County, Kansas, Wm. H. Daniels, Barney Pollman, Fred Meyn, F. E. Myers and G. A. Woodcock, members of the board of directors of said drainage district.

And thereupon your orator complains and says:

1. Metropolitan Water Company is now and at all the times hereinafter mentioned was a corporation duly created and organized under and by virute of the laws of the State of West Virginia, and a citizen and resident of said state. Defendant, The Kaw Valley

Drainage District of Wyandotte County, Kansas, is 37
now and at all the times hereinafter mentioned was a public corporation duly created and organized under and by virtue of the laws of the State of Kansas, to-wit: An Act of said state of the Laws of 1905, entitled,

"An Act in relation to natural water courses providing for the protection, control, deepening, widening, removing obstructions from, changing, regulating and establishing and maintaining the channel thereof; construction, maintenance and repair of levees along the same to prevent overflow and the raising and elevation of railroad tracks and public highways that interfere with the construction and maintenance of such levees; the construction and regulation of drains 38
and other works conducive to the public health, convenience and welfare in district subject to overflow, and to these ends providing for the organization of public corporations to be known as drainage districts and prescribing the duties and defining the powers of such public corporations,"

and was and is a citizen and resident of Wyandotte County, Kansas. Defendants, William H. Daniels, Barney Pollman, Fred Meyn, F. E. Myers and C. A. Woodcock, at all times hereinafter mentioned, were and now are the duly appointed, qualified and acting members of the board of directors of said drainage district, and all and each of them citizens and residents of Wyandotte County, Kansas.

This suit, therefore, is between citizens of differ- 39
ent states.

The matter in dispute herein exceeds, exclusive of interest and costs, the sum or value of Two Thousand Dollars ($2000.00). The land owned by complainant, hereinafter referred to, is of the value of more than One Hundred Thousand Dollars ($100,000.00) and will be wholly taken by the defendant drainage district, to the damage and injury of complainant to an amount exceeding One Hundred Thousand Dollars ($100,000.00), if defendants are permitted to proceed with the illegal and wrongful proceedings hereinafter mentioned.

40 Defendant, The Kaw Valley Drainage District of Wyandotte County, Kansas, will hereinafter be called the Drainage District.

2. The Kansas River is a navigable river from its mouth up for a distance of several miles where it ceases to be navigable, and extends through the Drainage District. Said river is in times of exceeding high water subject to overflow to the great damage of all the property located in the valley of said river for several miles up from its mouth. The drainage law of 1905 confers upon drainage districts organized under its provisions exclusive control over all natural water courses within their respective territorial limits, and
41 numerous, great and extensive powers for the accomplishment of many things for the public health, welfare and convenience; among other things for the prevention of overflow by such water course, by widening and deepening the channels thereof, and by constructing and maintaining levees along the banks thereof. And the Drainage District was organized for the purpose of preventing overflows by the Kansas River as aforesaid by widening and deepening its channels, and constructing and maintaining levees along its banks.

Drainage districts, under the drainage law of 1905, have the power to purchase private lands needed by it for carrying out their purposes, and also power to appropriate such lands by condemnation proceedings,
42 instituted by presenting an application in writing to the judge of the District Court or of the court of Common Pleas of the county in which such lands are situated, describing the lands sought to be taken, declaring the necessity of taking it for the use of the drainage district, and praying for the appointment of three commissioners to make appraisement and assessment of damages therefor. The judge appoints such commissioners and they make a report, filing the same with the county clerk of the county, stating the name of each owner and his damages separately, and if the drainage district shall pay the amount of said award to the county clerk of the conuty it may take posses-

sion of the land, but until such payment is made the 43
drainage district cannot take possession of said land. The land owner is given the right to appeal from said award to the District Court of the county where the question of compensation alone can be tried, and where that question is tried *de novo*.

3. The Drainage District on January 4th and January 5th, 1911, instituted two separate proceedings before the judge of the District Court of Wyandotte County, Kansas, at Kansas City, Kansas, for the purpose of appropriating certain lands in said county described in said proceedings, declared by said Drainage District to be necessary for its use in the construction of levees and widening and deepening the channel of the Kansas River, which flows through said 44
district, and otherwise improving said river and making other improvements necessary for the purposes provided in the drainage law aforesaid, and asking for the appointment of commissioners to make appraisements and assessmenst of damages, as provided by law. Said lands were along both banks of said river, extending from its mouth up to a street in Kansas City, Kansas, known as Central Avenue, and were all the lands on both sides of said river between said points, lying between the harbor lines established along said river by authority of the United States.

Most of said lands in various different tracts belonged to and still belong to the following individuals and corporations, residents and citizens of other states 45
than the State of Kansas, to-wit: Complainant, a citizen and resident of West Virginia; Fowler Packing Company, a corporation organized and existing under and by virtue of the laws of the State of Maine, and a resident and citizen thereof; United States Trust Company, a corporation organized and existing under and by virtue of the laws of the State of Missouri, and a citizen and resident thereof, as trustee; James Flanagan, Emma Flanagan, A. B. Adler, Gertrude Brown and Hazel Loomis, residents and citizens of the State of Missouri. Said lands were and are of very great

46 value, to-wit: a value in excess of five hundred thousand dollars.

Complainant owned and still owns in the lands embraced in said condemnation proceedings the following described tract of land, to-wit:

Beginning at a point of intersection of the United States harbor line on the right bank of the Kansas River, approved June 24, 1910, with the right bank of the Missouri River at Station 11 plus 54.90 feet on said harbor line; thence southwest to a point 30 feet distant from said harbor line and at right angles thereto, thence up stream and paralleling said harbor line 7080 feet more or less, to a point of intersection with the Government Survey Line of 1856 for the point of
47 beginning of complainant's land, thence continuing parallel to said harbor line and 30 feet distant therefrom 1295 feet, more or less, to an intersection with the line dividing allotments 16 and 17 as defined in partition suit 911, in the District Court of Wyandotte County, Kansas, thence south 61 degrees, 58′ west 164 feet, more or less, to the westerly line of that part of James Street leading to the County Bridge across the Kansas River; thence north 56 degrees 18′ west 335 feet, more or less, to the right bank of the Kansas River; thence down the Kansas River following its meanderings 1560 feet, more or less, to an intersection with the Government Survey Line of 1856; thence southeast on said Government Survey Line to the point of beginning, all lying and being in the northeast and
48 southeast quarter of the northeast quarter of Section 10, Township 11 South, Range 25 East in Wyandotte County, Kansas, except or subject to certain rights of way for various purposes over and across said land heretofore granted to or obtained by or through condemnation proceedings by the Kansas City Northwestern Railroad Company, Kansas City, Fort Scott & Memphis Railway Company, Union Terminal Railway Company, City Terminal Railroad Company, Edgewater Connecting Railway Company, Kansas City Viaduct & Terminal Railway Company, Kansas City, Missouri, and Kansas City, Kansas.

Complainant and the other owners of said lands, 49
whose names are hereinbefore mentioned, severally took such action in said condemnation proceedings as to cause the removal of said proceedings, so far as the same related to their several tracts of land, to the Circuit Court of the United States for the District of Kansas, prior to the commissioners making any appraisement, award or report.

Notwithstanding said removal of such proceedings aforesaid, the Drainage District and its attorneys caused and induced the commissioners appointed in said condemnation proceeding by the judge of the District Court of Wyandotte County, Kansas, to proceed with the condemnation proceedings as if said removals had not been had. Thereupon complainant and the 50
other owners of said lands aforesaid severally instituted suits in equity in the Circuit Court of the United States for the District of Kansas against said Drainage District and the commissioners aforesaid, asking that said Drainage District and the commissioners and their attorneys and agents be restrained from prosecuting said condemnation proceedings before said commissioners, and such proceedings were had in said several equity suits for injunction as that temporary injunctions were issued by said court restraining the Drainage District and other parties from proceeding with the condemnation proceedings before said commissioners.

4. Thereafter the attorneys for said Drain- 51
age District prepared a bill and caused the same to be introduced in the legislature of the State of Kansas, for the purpose of enabling said Drainage District to appropriate for the uses of said Drainage District, as provided in the said Drainage Law of 1905, all the lands of complainant and the other owners of said lands without any hearing as to the value of said lands or the ascertainment of said value or the damages that might be caused by the taking thereof, previous to the taking thereof, and without payment of such value or damages previous to such taking, and also to prevent complainant and the other owners of said land, who are

52 all non-residents of the State of Kansas, and citizens of other states, as herein set forth, from having an opportunity to be heard in the Circuit Court of the United States for the District of Kansas, upon the question of the value of said lands and the damages to be caused by the taking thereof after the taking thereof; but leaving unchanged the provisions of the Drainage Law of 1905 in relation to the appropriation of lands by other drainage districts and the appraisement and assessment of damages caused thereby.

Said bill has been passed by the legislature of the State of Kansas and approved by the Governor thereof.

A copy of said bill is attached hereto, made a part hereof and marked "Exhibit 1."

53 5. Said bill is entitled "An Act relating to navigable streams and to provide for the appropriation and holding of lands necessary for the improvement thereof to prevent overflow." Said Act provides substantially as follows:

SECTION 1. That the appropriation of lands for making the improvements provided for in said Drainage Law of 1905 is necessary for the protection of the health, life and property of the people of any drainage district through which a navigable stream runs, on which harbor lines have been established by federal authority.

54 SECTION 2. That the land necessary to be appropriated shall consist of all land lying between said harbor lines, together with a strip forty (40) feet wide on the land side of and contiguous to such harbor lines.

SECTION 3. That whenever private parties or corporations claim to own any part of the land so to be appropriated in any drainage district having taxable property to the amount of not less than Forty Million Dollars ($40,000,000.00), and which shall have deposited with the treasurer of the county wherein the land is situated money to compensate for the appro-

priation of lands necessary for the making of such improvements, the governor, when satisfied that the money so deposited is amply sufficient to make full and adequate compensation for the property to be appropriated, shall issue a proclamation declaring that the State of Kansas has taken and appropriated said land, describing the same, and proclaiming that from and after the date of the publication of said proclamation said property and the right to the possession thereof, vests in the State of Kansas; that said proclamation shall be published in the official paper of the county wherein the land appropriated is situated and shall be notice to all parties interested that the State of Kansas has taken and appropriated the land therein described, and that thereupon the governor shall take and hold possession of said land in the name and on behalf of the state; provided, however, the governor may appoint and designate a board of directors of the drainage district in which said lands are situated as agents of the state to take and hold said possession for and on behalf of and in the name of the state, and the possession of the land by the governor or such agents shall be possession by the state; and that the sheriff of the county wherein the land is situated shall, upon request of the governor or such agents, put them in possession of the property. 55 56

SECTION 4. That from and after the issuing and publishing of such proclamation any person interfering with the possession of the property by the state or its agents shall be deemed guilty of a misdemeanor and, upon conviction, shall be fined in a sum not less than One Hundred Dollars ($100.00) nor more than One Thousand Dollars ($1000.00) or by imprisonment for not less than thirty (30) nor more than ninety (90) days, or by both such fine and imprisonment, and that the sheriff of the county wherein the land is situated, upon request by the governor, shall remove all persons interfering with the possession of the state or its agents from said land and protect the agents of the state in such possession. 57

SECTION 5. That for the purpose of ascertaining whether or not any private person or corporation is the owner of any part of the land so taken, and if such owner, to provide and secure full and adequate compensation for the appropriation thereof, the attorney-general of the state, upon the publication of such proclamation by the governor, is hereby directed to commence an action in the District Court of the county wherein the land is situated, to be entitled, "The State of Kansas vs. all persons having or claiming an interest in the land lying between the established harbor line of the .....River, and within a distance of forty (40) feet landward therefrom, within the .....Drainage District in..... county"; that notice shall be given by publication of the filing of said action, setting forth the nature of said suit and that all claimants must appear and set forth their claims on or before the date therein named, which shall not be less than forty-one days from the date of the first publication, and that upon their failure so to do, a judgment will be rendered therein excluding them from any interest in said land or any part thereof and enjoining and barring them from asserting any claim to said land or any part thereof adverse to the State of Kansas; that such publication shall be made in the manner provided for the publication of notices in the Code of Civil Procedure of the State of Kansas; that if the claimants so notified shall appear in said cases, then such cases, as to the parties so appearing, shall proceed to trial as other civil actions before a jury, unless a jury be waived, to determine the ownership of the property and to assess the value thereof and other damages for the taking of such portions of it as may belong to parties other than the public; that in the event the claimants shall fail to appear on or before the day named a *pro confesso* judgment shall be rendered excluding them from any interest in the land, which judgment shall become final and conclusive at the expiration of six months from its rendition, unless the claimant shall make application within such period for a vacation of such judgment and for permission to defend in said action, and shall show to the court that

he had no knowledge or notice of the pendency of such 61
action prior to the rendition of the judgment.

SECTION 6.—That the drainage district into or through which such navigable streams flow are made liable for the value of any land so appropriated, together with all damages which may be occasioned thereby to the owner thereof and the costs of suit, and that any judgment rendered in said action against the State of Kansas shall be a lien upon all the taxable property in the drainage district; and that the Board of Directors of the drainage district is empowered and directed to pay said judgment and costs from the funds in their hands and under their control for such purpose, and that in the event such funds are insufficient, or for any reason may not be used for such purpose, the 62
Board of Directors shall issue bonds or levy a tax for the payment thereof, as provided by law; and that in the event that the Board of Directors of such drainage district shall fail or neglect to pay the full amount of the judgment and costs, the Board of County Commissioners of the county wherein the land is situated is empowered and directed to levy a tax upon all the taxable property within the limits of the drainage district and cause the same to be executed upon the tax rolls and collected as other taxes, in a sum sufficient to pay such judgment and costs in full, and that the same when so collected shall be so applied; and that if for any reason there should be a failure to satisfy such judgment, the rights of the state to such land shall be divested and the possession thereof shall revert to the 63
former adjudicated owners, in which event compensation shall be awarded for any loss or damage occasioned by the temporary appropriation, and that the court shall render judgment therefor, which judgment shall be enforcible as in case of permanent appropriation; provided, however, that in any such action it shall be competent for the state to dispute and contest the title of the claimant and to show that the land so appropriated constituted an obstruction or encroachment wrongfully placed in the channel or between the banks of said stream, or that for any other reason the claim-

ant is not entitled to any compensation therefor, and that if it shall be found that the land so appropriated constituted an obstruction wrongfully placed in the stream or that for any reason claimant is not entitled to compensation or damage for the land, judgment shall be rendered accordingly.

SECTION 7.—That any railroad or railway company having a right of way crossing any of the land so appropriated shall not be deprived of an easement for the use of such right of way, but shall be permitted to retain the right of way it now has for the purpose of crossing or running upon, along or over such levee; provided, however, that such use and occupancy shall not interfere with the widening of the stream and shall not become an obstruction to the flow of the water therein, and shall not interfere with the height or otherwise impair the usefulness of the levees to be constructed for the purpose of preventing overflows.

SECTION 8.—That any person having personal property in or upon any land appropriated shall remove the same within a reasonable time, to be fixed by the agents of the state, and if they fail or neglect so to do, such agents may remove the same or the Attorney General may institute a mandamus suit or suits in any court of competent jurisdiction to compel such removal.

SECTION 9.—That this act shall not be construed as a repeal of Chapter 215 of the Laws of 1905 (the Drainage Act) or any statute relating to the matters therein provided for, but as supplemental thereto.

SECTION 10.—That the Board of Directors of such drainage district is empowered to grant easements in or to such forty (40) foot strip for such use and occupancy as will not interfere with the right of the state to use the same for the prevention of overflow, and if at any point along such harbor line the full width of forty (40) feet is not required for the construction of levees or other improvements to pre-

vent overflow, the Board of Directors of the Drain- 67
age District may relinquish such part as may be deemed unnecessary.

SECTION 11.—That the remedies provided by other acts relating to the same subject matter shall be held to be concurrent herewith.

SECTION 12.—That this act shall take effect and be in force from and after its passage and publication in the official state paper.

Said act has been signed by the Governor of the State of Kansas and published in the official state paper.

6. The Governor of the State of Kansas threat- 68
ens to and is about to issue a proclamation in pursuance of the provisions of said act, notwithstanding no sufficient sum of money has been deposited by said Drainage District to make full and adequate compensation for complainant's lands and the lands of the other owners hereinbefore named, declaring that the State of Kansas has taken and appropriated the lands of this complainant and said other owners, describing the same, and proclaiming that from and after the date of the publication of such proclamation said land and the right to the possession thereof vests in the State of Kansas.

Said Drainage District and all of the members of the Board of Directors thereof threaten to, and, 69
unless restrained will, immediately upon the publication of said proclamation by the Governor of the State of Kansas, take possession of complainant's lands and said other lands for its uses and purposes, as provided in said Drainage Law of 1905, and for the same uses and purposes for which said condemnation proceedings were instituted before the District Judge of Wyandotte County, Kansas, and removed to the Circuit Court of the United States for the District of Kansas, as hereinbefore set forth.

70 7. Said act (Exhibit 1) is unconstitutional, null and void and in violation of the constitutions of the State of Kansas and of the United States.

Section 17 of Article II of the Constitution of the State of Kansas, as amended in 1906, provides:

"All laws of a general nature shall have a uniform operation throughout the state and in all cases where a general law can be made applicable, no special law shall be enacted; and whether or not a law enacted is repugnant to this provision of the constitution shall be construed and determined by the courts of the state."

Said act violates said section of the Kansas Constitution in this, that said act is a special law, ap-
71 plicable only to The Kaw Valley Drainage District of Wyandotte County, Kansas, and a general law could be made, applicable to all drainage districts organized under the Drainage Law of 1905, covering all the matters and things contained in said act (Exhibit 1).

The sole purpose of said act (Exhibit 1) is to provide a special procedure for and to confer a special privilege upon the Drainage District of Wyandotte County, Kansas, and to put it in possession of the lands of complainant and the other owners aforesaid, and to aid said Drainage District in obtaining such possession as attempted in condemnation proceedings begun before the District Judge of Wyandotte County, Kansas, as hereinbefore explained.

72 Said act (Exhibit 1) is in conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it deprives complainant and the other owners of said lands of the equal protection of the laws, for that it permits the lands of complainant and the other said owners to be taken for the uses and purposes of the Drainage District without compensation first being ascertained and paid, whereas in all other drainage districts organized under the drainage law of 1905 no land can be taken for the purposes of the drainage district without compensation first being ascertained and paid.

Said act (Exhibit 1) violates Section 1 of the 73
Fourteenth Amendment of the Constitution of the United States, in that it takes the property of complainant and the other owners aforesaid, without due process of law, for that Section 4 of said act prescribes penalties against the owners of the land embraced in the terms of the act for refusing to permit the drainage district to take possession of their lands, that are so drastic as that no owner of any of said lands can invoke the jurisdiction of any court to test the validity of said act except at the risk of confiscation of his property and imprisonment for long terms.

Inasmuch as complainant can have no adequate remedy except in this court and to the end, therefore, that said defendants may, if they can, show why com- 74
plainant should not have the relief hereby prayed for, and make a full disclosure and discovery of all the matters aforesaid, according to the best of their knowledge and belief, full, true, direct and perfect answer make to the matters hereinbefore stated and charged, but not under oath, an answer under oath being hereby waived, complainant prays that Your Honors may grant a writ of injunction, issued out of and under the seal of this Honorable Court, perpetually enjoining and restraining defendants, The Kaw Valley Drainage District of Wyandotte County, Kansas, its members and its attorneys and agents, from taking possession of the lands of complainant, or any part thereof, under and in pursuance of said act of the Legislature of Kansas, attached hereto as Exhibit 1. 75

Complainant prays that a provisional or preliminary restraining order be issued, to the same purport and effect as hereinbefore prayed for, against the said defendants, to remain in force until the further order of the court herein, or until this suit shall be finally disposed of.

May it please Your Honors to grant unto complainant not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpoena issuing out of and under the seal of this court, directed to the Kaw Valley Drainage District of Wyandotte County, Kansas, Wm. H. Daniels, Barney Pollman,

76 Fred Meyn, F. E. Myers and G. A. Woodcock, members of the Board of Directors of said Drainage District, commanding them on a day certain to appear and answer unto this bill of complaint, and to abide by and perform such orders and decrees in the premises as to the court shall seem proper and as required by the principles of equity.

WILLARD P. HALL,
Attorney for Complainant.

State of Missouri, County of Jackson, ss.

Willard P. Hall, first being duly sworn, makes oath and says that he is authorized by the complainant in the foregoing bill of complaint to make this affi-
77 davit for it; and that the facts set forth in said bill are true.

WILLARD P. HALL,

Subscribed and sworn to before me, this 3rd day of February, A. D. 1911.

GEO. F. SHARITT, *Clerk.*

Exhibit 1, called for by the foregoing bill of complaint, is hereinbefore printed as "Exhibit A."

78

EXHIBIT "C." 79

IN THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF KANSAS.

METROPOLITAN WATER COMPANY, Complainant, vs. KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS ET AL. Defendants.	No. 8968.

RESTRAINING ORDER. 80

Now come said complainant and said defendants on this 8th day of February, A. D. 1911, and upon the application of said complainant for an injunction against said defendants, and each of them, as prayed for in its bill of complaint, and after a consideration of said bill of complaint and affidavits in support thereof, it is considered, ordered and adjudged that said defendants and each of them be and are hereby restrained in accordance with the prayer of said complaint until the further order of this court, and a hearing of the application for a temporary injunction is set for the 18th day of February, 1911, at 10 o'clock a. m. of said day, at the United States Court Room in Kansas City, Kansas. 81

SMITH MCPHERSON, *Judge*.

(Endorsed):

No. 8968.

Metropolitan Water Company

vs.

Kaw Valley Drainage District et al.

RESTRAINING ORDER.

February 8, 1911.

George F. Sharritt, Clerk.

82 **EXHIBIT "D."**

IN THE CIRCUIT COURT OF THE UNITED STATES.

DISTRICT OF KANSAS, FIRST DIVISION.

METROPOLITAN WATER COMPANY, Complainant, vs. THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Wm. H. Daniels, Barney Pollman, Fred Meyn, F. E. Myers and G. A. Woodcock, Members of the Board of Directors of Said Drainage District, Defendants.	No. 8968. Equity.
FOWLER PACKING COMPANY vs. Same Defendants.	No. 8970.
A. B. ADLER vs. Same Defendants.	No. 8973.
GERTRUDE L. BROWN AND HAZEL LOOMIS vs. Same Defendants.	No. 8975.
THE UNITED STATES TRUST COMPANY OF KANSAS CITY, MISSOURI vs. Same Defendants.	No. 8976.
SULZBERGER & SONS COMPANY vs. Same Defendants.	No. 8977.

83

84

Mr. Willard P. Hall, Mr. C. F. Hutchings, Mr. McCabe Moore, Messrs. Beardsley, Gregory & Kirsh-

ner, Mr. Marcy K. Brown, Mr. O. H. Doan, Mr. O. L. 85
Miller, for said complainants; Messrs. Keplinger and Trickett, for defendants.

Opinion.

SMITH MCPHERSON, Judge:

The six cases above entitled by bills in equity present the same questions. The Kaw Valley Drainage District is a subdivision of Wyandotte County, Kansas, created under a statute of the state of a few years since, and can both sue and be sued as such. Under this statute the drainage district took steps to widen the Kansas River, a navigable stream, from its mouth, for some distance up stream to prevent overflows, 86
conserve property interests, and for the protection of the health of the people. Proceedings were instituted for that purpose before the County Court, resulting in the appointment of appraisers of the property so to be taken, as well as property depreciated in value. Those proceedings were transferred to this court under the removal statutes. By reason of orders therein made, the drainage district carried the cases to the United States Circuit Court of Appeals for this Circuit, and the cases are there to be heard within a few days.

About two weeks since the Legislature of Kansas enacted a new statute, now operative, if valid. This statute is supplemental to the prior statutes giving a concurrent remedy for taking property for widen- 87
ing of a stream. The statute is general in its terms. But, under the facts, it can have no application to any other stream than the Kansas River, and to no other drainage district than the one made a defendant herein. The statute provides that the Governor of the State by proclamation can take possession of such property belonging to private parties as may be necessary to widen and straighten the stream. The proclamation of the Governor has been issued specifically describing the property thus sought to be taken, and by the Governor declared to be taken for such pur-

88 poses. Each of the complainants herein own property thus sought to be taken. This statute further provides that the Attorney General of the State shall bring an action to determine the ownership and value of the property thus taken. The damages are to be paid by the drainage district and the amounts thereof are to be made a lien on all the property within the drainage district, and proceedings will be entertained to thus and thereby make payment to complainants and others in a like situation.

These bills in equity conclude with prayers that the said drainage board and the members thereof be enjoined from taking action under that statute, for the reasons:

89 It is said that the statute is in conflict with Section 17 of Article II of the Constitution of Kansas, which provides that all laws of a general nature shall have a uniform operation throughout the state where a general law can be made applicable.

It is further contended that the statute is in conflict with the Fourteenth Amendment of the Constitution of the United States in that it provides for taking complainant's property without due process of law, and that the penalties of the statute are so drastic that an owner does not dare to engage in litigation without being subjected to the chances of imprisonment for long terms and the confiscation of his property.

Restraining orders were issued and the cases set down for hearing as to whether such restraining or-
90 ders should be continued or vacated, and if continued, followed by temporary writs of injunction.

The question now presented is whether I, as sole presiding judge, shall proceed with the cases, or whether two other judges be called upon to consider the cases, and make orders herein. This involves the construction of Section 17 of the Act of Congress of June 18, 1910, in which as so far as material at this time, is in the language following:

"Sec. 17. That no interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the

action of any officer of such State in the enforcement 91
or execution of such statute shall be issued or granted by any justice of the Supreme Court, or by any Circuit Court of the United States, or by any judge thereof, or by any district judge acting as circuit judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit judge, or to a district judge acting as circuit judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court of the United States or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such ap- 92
plication. Whenever such application as aforesaid is presented to a justice of the Supreme Court of the United States, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however,* that one of such three judges shall be a justice of the Supreme Court of the United States or a circuit judge."

There are other provisions in the statute, such as giving notice to the Governor and Attorney General of the State, allowing the single judge to issue the restraining order, and expediting the hearing.

That these proceedings are for the purpose by injunction of restraining the enforcement of the state statute, I have no doubt. It is alleged that such state 93
statute is absoluely void as being in conflict with both the state and the national constitutions. The prayers are in effect that the statute be decreed void. Neither have I any doubt that the action is to restrain the action of an officer of the State of Kansas, namely, the Governor. This is so because the state statute in question provides that when the Governor issues his proclamation, which he has done, he shall at once take possession of the property either in person, or he may designate the officers of the drainage board to take such possession for him and in his name, but such officers of the drainage board to act as agents of

94 the Governor. Therefore, I am of the opinion that the congressional statute is directly involved. And the question remains, shall this court now halt these proceedings, or shall other judges be called in to take control of the cases.

In the Constitutional Convention at Philadelphia in 1787, it was proposed by a member, Mercer of Maryland, that a provision should be inserted to the effect that a National Court should not have the power to declare a state statute void. Mercer was hostile to any constitution, and any government. Washington, Madison, Hamilton, with all the great men of the Convention, and their following, would not for an instant recognize such a proposition. They could
95 not do so with any propriety, because they provided that every judge, National and State, should take an oath to observe and enforce the Constitution, and by another provision that the Constitution of the United States should be the supreme law of the land. And when a state statute is in conflict with the Constitution and litigation arises relative to such state statute, the state statute must go down and be declared void, if in conflict with the National Constitution. And from the earliest days of this Government, courts, when finding that there is such conflict, have not hesitated to declare such statute void, as was their duty to so hold under their oaths of office. But there have been many people who fail to see the logic of this, and fail to see that such is necessary, if the National Constitu-
96 tion is to remain the supreme law of the land. It was believed by many that to declare a state statute void was such a solemn act, to be exercised only in undoubted cases, that the power should be lodged in not less than three judges. This was the evil, real or supposed, that Congress dealt with when Section 17 above set out, was enacted. It will be observed that one clause of the statute is "whenever such application as aforesaid is presented to a justice of the Supreme Court of the United States, or to a judge, *he* shall immediately call to his assistance to hear and determine the application two other judges." One of such other judges must either be the Associate Justice of the Su-

preme Court assigned to the circuit, or a circuit judge. 97
The word "he" means the then sole judge presiding in the court in which the litigation is pending, and whether such judge be the Associate Justice or a circuit judge, or a district judge, presiding as an acting circuit judge. So that, if two other judges are now to be called in, I must make the designation because the statute says "he" (the presiding judge) shall call to his assistance the two other judges.

But the foregoing matters do not determine what shall now be done in these cases. As above stated, the evil, and the only evil, which Congress attempted to remedy, was to prevent one judge from declaring a state statute void as against proceedings sought to be done thereunder by a state officer. During the en- 98
tire history of this Government courts have frequently, and during every year of the existence of the Government, and at almost every term of court, State and National, the question has been presented as to whether a state statute is valid or void. It is apparent that Congress did not regard judgments and decrees pronounced by one judge holding a state statute to be valid, as an evil. And statutes must be construed in the light of the evil sought to be corrected. And the evil, and the only evil, struck at was, the holding of state statutes as void by the judgment and decree of a court composed of but one judge. I again quote from the statute: "that no interlocutory injunction suspending or restraining the enforcement, operation or execution of any statute of a state" shall be decreed 99
void by a court composed of but one judge. There is no one sentence of the statute which warrants the interpretation that a court held by but one judge, can not decree a statute valid.

The statute as a whole must be read, and construed as a whole. I cannot believe from the mere fact that the pleading challenges the validity of a state statute that a court must stop in its proceedings, and send for the Associate Justice, or a circuit judge when it may be that when the facts are developed that the challenge of the statute is only plausible, but without substantial merit.

100 Whether the statute in question is valid or not has not yet been argued. To now make a designation of two other judges to sit in this case would be an arrogance of power not possessed. Of course, it would be most agreeable, and most helpful to have the benefit of a consultation with two other judges. But it is not a question of convenience or pleasure. It is a question of power.

If after argument as to the validity or invalidity of this state statute, I shall reach the conclusion that the state statute is valid, then we have reached the end of the matter, subject to a reversal or modification by the Appellate Court. And if I reach such conclusion, the restraining orders heretofore issued will be vacated, and the interlocutory injunction denied. In that
101 event the case can be carried to the Supreme Court, and if in the end the statute should be overthrown, it would be so done, by that court, composed of nine justices.

If, upon the other hand, after argument, I am persuaded that there is reason for believing that the state statute is void, I will make the designation of two other judges to take part in the hearing of the case and a reargument will be made and the questions determined.

I will now hear arguments on the question as to the constitutionality or unconstitutionality of this Kansas state statute.

102 February 20, 1911.

The validity of the statute in question has been argued at length and briefs have been presented.

The Kansas Constitution provides that all laws of a general nature shall have uniform operation throughout the state, and in all cases where a general law can be made applicable, no special law shall be enacted. During most of the history of the State of Kansas, the construction thereto was given that the Legislature itself was vested with the power to determine whether the constitutional provision was complied with or not. But special legislation became so oppressive, that the people took the matter in hand and

amended their constitution by adding to the foregoing: 103
"whether or not a law enacted is repugnant to this provision of the Constitution, shall be construed and determined by the courts of the state." So that now the question in Kansas, as it is in all other states, is for the courts to say whether the statute is repugnant to the state constitutional provision.

The Fourteenth Amendment to the Constitution of the United States provides that no state shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws. All of counsel in this case have conceded that insofar as this case is concerned, if this statute is valid, under either the state constitutional provision, or under the Fourteenth Amendment, it is valid under the other, 104
and if the statute is void under the one provision, it is void as to the other. I agree to this.

These provisions are not new. It is doubtful if there has ever been a state constitution in this country but that such provision could be found therein, in substance and meaning at least, as is now found in the Kansas State Constitution. The Fourteenth Amendment is still older. The provision now under consideration is copied from Magna Charta of seven hundred years ago. It is a part of our common law, and is as highly prized as any other institution of either English or American civilization. But, from the earliest days of this country, the trouble was in its enforcement, because each state determined for itself whether this wise provision should be observed, or 105
should be disregarded. One great result of the Civil War, 1861-1865, was the adoption of the Fourteenth Amendment, inserting in the National Constitution the provision that no state shall do so and so. To now assert, as is too often asserted, that state legislatures should be supreme within the limits of their state, as to all matters of legislation, is to declare as mere idle words, the great principles of Magna Charta and to declare as idle words the provisions of the Fourteenth Amendment. Magna Charta was not wrung from King John, nor was the contest carried on for years thereafter between the Church and the State.

106 with any purpose of having those provisions disregarded. And the great efforts that in the end were successful, to bring about the adoption of the Fourteenth Amendment, were not for the purpose of leaving it to the states alone to determine in all matters what legislation they should have.

Therefore, the question is as to whether this statute is in conflict with either the State Constitution or the Fourteenth Amendment. There is not much difficulty in phrasing the rule. But, there has been great difficulty, and such difficulty will ever be present, as to applying the rule to the statute that may be brought before the courts for review. Between the time the Fourteenth Amendment was adopted in the year 1868,
107 and the time of putting forth the book entitled, "The Fourteenth Amendment," by Brannon, Judge of the Supreme Court of West Virginia, in 1901, nearly one thousand cases had been reported from the courts of the country as to the application of the Fourteenth Amendment, and since the publication of that work, as stated at page 1605, Volume 2 of Watson on the Constitution, but recently published, there are now more than 1500 reported cases arising under the Fourteenth Amendment.

I mention the foregoing to show that it is utterly impracticable to review the cases.

Suffice it to say, that under the provision of the State Constitution and likewise of the Fourteenth Amendment, all persons, regardless of nationality, race
108 or color, and regardless of station in life, whether rich and powerful, or in poverty and weakness, must be subjected to the same identical legislation. And it will be kept in mind by the use of the word "person" is not meant alone the living human being, but the term implies and covers partnerships, associations and corporations. And the word "corporations" includes those organized for money profit, and likewise includes all municipal and political corporations, such as cities, towns, school districts, drainage districts, and so on.

With these things in mind, I shall proceed to consider whether the statute in question is in violation

of these solemn and well nigh sacred provisions of the constitution of both state and our national government. 109

In saying that all persons shall be equal before the law, is not meant that all persons within the state shall be subject to the same legislation. That is not practicable, nor would it be wise if it were practicable. Classifications can and must be made in some instances. Mere arbitrary classifications cannot be made. The classification, either as to persons or corporations, or the property involved, must be a reasonable and fair one. It must be justly made, and it is for the courts to determine whether the classification falls upon the one side, or falls upon the other. A reference to a few of the leading cases will show what the true rule is. 110

Gulf, etc., R. R. v. *Ellis,* 165 U. S. 150, adjudged a Texas statute void, as an arbitrary and unjust classification. The statute provided that a person having a claim against a railroad company for less than $50.00 for live stock killed, or for services rendered, should be allowed an attorney's fee in addition to the allowance of his claim. The Supreme Court of the United States adjudged a Kansas statute void in the case of *Cotting* v. *Kansas City Stock Yards Co.,* 183 U. S. 79. That statute undertook to regulate the charges of stock yards for receiving and feeding and watering cattle, and for other purposes. It was based upon the amount of business transacted. It was clearly for the purpose of regulating the charges for the Kansas City Stock Yards only, without reference to other stock yards of the State of Kansas. But the Supreme Court, in an opinion by Justice Brewer, decreed that the statute was a mere capricious, wanton and most arbitrary classification, and therefore void. 111

The two opinions just cited are based upon many authorities, and all that can be said upon that side of the question as to arbitrary classification and special legislation can be found in those two opinions. To say more than is therein said is an elaboration without strength of statement.

The case of *Atchison, Topeka & Santa Fe Ry. Co.* v. *Matthews,* 174 U. S. 96, is also a Kansas case,

112 maintaining and upholding the validity of a Kansas statute with reference to attorney's fees in actions for damages by fire from railroads. The statute was adjudged to be valid. The court was divided. The four dissenting justices pointed out that the case was much like the Ellis case, above cited, from Texas, in which it was held that the allowance for attorney's fees in actions for labor and for stock killed could not carry attorney's fees.

The Cotting case from Kansas and the Ellis case from Texas were with reference to statutes solely and exclusively devoted to business propositions. To allow an attorney's fee in favor of one who has a claim for services against a railroad company, and to not
113 allow an attorney's fee for one who sues any other corporation, or an individual, for services rendered, is mere fancied and arbitrary distinction, without just reason. Hence it was that the statute was adjudged void. To legislate as the Kansas Legislature did, that rates and charges for the Kansas City Stock Yards Company should be fixed and regulated by law, when stock yards at Wichita and other places should not be regulated by law, was a mere fancied and arbitrary distinction, not founded upon reason. But the other Kansas statute, adjudged to be valid, as was done in the Matthews case above cited, is upon a different principle, and that is that it was of and concerning matters designated as police matters, namely, the general welfare of the state. Kansas is a prairie state.
114 From the earliest days to the present, much damage had been done by prairie fires. It was known that locomotives running at a high speed would start these fires, resulting in the loss of homes and sometimes of life. The Kansas Legislature, in the exercise of its police powers, deemed it important that fires should be prevented to the utmost limit of the power so to do by the railroad companies. In the exercise of the police power, it was believed to be just, that if damages for fires thus occasioned were not promptly paid for, an attorney's fee should be allowed. Recently I had occasion to examine this question in the case of *Chicago, Burlington & Quincy R. R. Co.* v. *Board of*

Supervisors, 170 Federal Reporter, 665, from my own 115
district. While I recognized that ordinarily in taking private property for the straightening of a natural stream of water, the rules governing eminent domain must be observed, but that in many instances, burdens could be imposed without compensation, under the exercise of the police power of the state. As of course, I do not cite one of my former opinions as an authority, but I call attention thereto for the reasons that my views as then expressed may be considered, thereby abbreviating this opinion. And that case was affirmed. .... Fed. Rep. .....

That the straightening of streams and preventing overflow is an exercise of the police power I am not in doubt. It is so nearly within the knowledge of all per- 116
sons, that this court takes judicial notice of the fact that the Kansas River near its mouth is frequently overflowing its banks. But eight years ago this stream overflowed to such an extent as to destroy millions of dollars in value of property, rendering a great many people homeless and carrying disease, death, and devastation generally with the flood. Surely, to prevent the occurrence of this is an exercise of the police power. In my opinion this case, on principle, is a much stronger case than the Matthews case with reference to prairie fires, above cited. Of the several Kansas Supreme Court cases, they all fall within the rule of the Ellis and Cotting cases, or that of the Matthews case.

In *Missouri* v. *Lewis,* 101 U. S. 22, it was held 117
that the Fourteenth Amendment, contemplating the protection of persons and classes of persons against unjust discriminations by states, does not relate to territorial or municipal arrangements made for different portions of a state. But that every state has full power to make for municipal purposes, political subdivisions of its territory and to regulate their local government, and that the state may establish one system of law in one portion of a state and another system in another. Justice Bradley, in writing the opinion, in speaking of the Fourteenth Amendment, said that it contemplates persons and classes of persons;

118 that it has not respect to local and municipal regulations that do not injuriously affect or discriminate between persons within the places for which said regulations are made. Suffice it to say that the court maintains the proposition that the state does have the power for providing one system of laws for one part of a state, and another system of laws for another part of the state, in so long as it does not discriminate between the persons of such subdivisions, and provided that each person within the entire state is accorded the full protection of the laws. And this thought is emphasized with reference to different parts of the state, as to population, the amounts and value of property, and so on. In *Magoun* v. *Illinois Trust Co.*, 170 U. S. 283, a state statute was held to be valid, and not in
119 conflict with the Fourteenth Amendment. In *American Sugar Co.* v. *Louisiana*, 179 U. S. 89, a state statute was upheld, that persons who refined their own sugar should be exempted from the tax, while those who carried on the business of refining should have no exemption, and that statute was upheld. In *Railroad Co.* v. *Pennsylvania*, 134 U. S. 232, the entire subject of taxation and exemptions, within the meaning of the Fourteenth Amendment, is fully discussed, and the holding was that such classifications could be made.

Sentell v. *R. R.*, 166 U. S. 698, although about a trifling matter, namely, a dog, well illustrates the differences between legislation upon a business proposi-
120 tion and the exercise of the police power. *Ozan Co.* v. *Union National Bank*, reversing the Circuit Court of Appeals for this circuit, is to the effect that there cannot be an exact exclusion or inclusion of persons and things in a classification for governmental purposes, and the same will not be invalid because certain imaginary and unforeseen cases have been overlooked. See Cooley's Constitutional Limitations, Thorpe's Constitutional History, Watson on the Constitution, Brannon on the Fourteenth Amendment, Guthrie on the Fourteenth Amendment, all of which elaborate these views.

It is now necessary to briefly review the Kansas statute upon the question. A statute was enacted in

1905, upon the general subject of establishing drainage districts by the county commissioners. Under that statute the defendant drainage district was established, reaching from the mouth of the Kansas River to a distance of eight, ten or twelve miles above. Elaborate provisions were made for the securing of land to straighten and deepen the channel of the river and thereby prevent overflows. That statute is applicable to all drainage districts within the state. That the statute could have well served its purpose as to the defendant drainage district herein is without question. But, a few weeks since, the Kansas Legislature enacted another statute that is now said by the property owners, who are complainants herein, to be void. 121

The Kansas River is a navigable stream from its mouth to a point above the upper line of this drainage district. Whether it has been declared navigable for a much higher distance need not be considered. It being a navigable stream, it is within the control of the United States Government, and from the mouth upward, for approximately one-half the distance only, on each side of the stream, harbor lines have been established by the government. Because of this fact it is said that the statute is special legislation and does not give all the land owners within the district the equal protection of the laws. 122

It is within the power of the general assembly of the state to determine for itself what property shall be taken, and this is a question with which the courts have no power. At all events, it is not made apparent by these bills of complaint, nor by arguments of counsel, that the drainage district is wantonly taking a wider strip than is apparently necessary and for which the taxpayers must make compensation. There is a reason, and a good one, why the harbor lines have not been extended all through the district by the United States Government, acting through the War Department. And that reason is that the lower part of the district, only, is comprised of property of great value. There the valuation is largely by front foot. It is a great business district, comprised of railroad yards, with railroad bridges, packing houses upon either side, 123

124 and stockyards and manufacturing plants of very great value. The upper part of the district is but little, if any, more than a farming or grazing district, and entirely unlike that part through which the harbor lines have been established. Clearly, as it seems to me, the Legislature had the power to determine by statute a different method for the ascertainment of what land should be taken and a procedure for ascertaining the value. The statute points out what lands shall be taken, and that the Governor of the state, by proclamation, shall take the same. It is then provided that the Attorney General, within a fixed time, shall bring an action as *in rem*, give public notice to all claimants who, within a specific time, must enter their appear-
125 ances and assert their claims, including the compensation to which they claim they are entitled. Therein the complainants say the statute is void, as being arbitrary and unjust in such classification and in such taking. I do not think so. Criticisms can be made, as they have been made, of such a character as to arrest the attention of a court. But it should be observed that there never has been and cannot be legislation which is at all times and in all respects just to all litigants. In giving bonds, in both civil and criminal cases, the employment of counsel, taking appeals, preparing and paying for records, the laws do not bear upon all alike, and it is impossible to have laws that will.

It is contended that the Attorney General will be
126 in charge of the litigation. This is a mistake. He will bring the action, and bring the parties into court. From that time the litigation will be between the drainage district and property holders. No doubt the Attorney General can appear for the drainage district, but it will be for the district. It is said, not that he will, but that possibly he *may* trifle with the litigation, not press it in good faith, and in many ways hamper these complainants. That cannot be so, even if he were so disposed, because his position is that of trustee, and within the power of the court to remove him from his trusteeship and place a party in power who would not only expedite the litigation, but would

see to it that it was fairly conducted. It is said that 127
alleged encroachments have been made upon the river, and that the state will have the right, as a state, in the same action or proceeding, to have the question determined as to the amount of such encroachment, and that because the state will make such claim, by reason of the encroachment, that the subject matter of the litigation will not be separable, and therefore the litigation must be conducted to a conclusion in local courts, with jurors comprised of the taxpayers of the district, and that herein is a denial of equal protection of the laws as provided for by the Fourteenth Amendment.

The answer to all this is, that it is not at all material in what name the action is entitled. Courts 128
look beyond mere forms and ascertain who the beneficiaries are, and then determine where the litigation shall be carried on. By whatever title, the litigation will be between the drainage district as the beneficiary, a body corporate, with powers to sue and be sued, and the owners of the lands to be taken for those purposes.

The State of Kansas has no interest and can have no interest as a state therein, because Section 7 of the Act of 1905 has already conveyed to the drainage district, all the lands, including the banks and beds and channels of the stream, subject only to the jurisdiction of the United States over navigable waters. The beds of these streams and all encroachments, if any, between the banks, already belong to the drain- 129
age district. As of course, the courts will see to it, that if in other respects these parties have the right to have their litigation carried on in United States courts, the State of Kansas, by its Legislature, cannot circumvent such removals. Such attempts have been made heretofore, in all instances resulting in complete failures. I am not now passing upon the question whether these complainants can have their cases removed to the United States courts for trial, but I am saying that if the act of January, 1911, seeks to prevent a removal and such construction should prevail, that so much of the statute would be void.

130 The question that has given me the greatest con
cern is that provision of the recent statute providing
for compensation, or giving security therefor. In
many of the states the constitutional provision is to the
effect that private property cannot be taken for a pub-
lic use without first ascertaining the value thereof and
requiring that compensation therfor shall be made in
advance of the taking, or giving security therefor. Such
a provision is not to be found in the Kansas Constitution. And yet, in the absence of that, no court
would allow private property to be taken for a school-
house, for a court house, or for a drainage district,
or for a railroad company, or for any other public
purpose, without seeing to it that when the amount
131 of the compensation is determined, payment therefor
shall be made. Any other holding than this would
be oriental methods to the very limit. No man could
know what property he would own tomorrow, of that
which he owns today. On the other hand, no man
must be allowed to say that the public shall not take
his property for a public use. But he does have the
right to say, and the courts will uphold him, in that
in being compelled to part with his property, in lieu
thereof he shall have the money value. It is not nec-
essary that he should have it cash in hand. He must
have reasonable indemnity for its payment within a
reasonable time. When the stream has been widened
and perhaps the dirt taken, thrown into the river and
carried to the Gulf, as of course, he can never get
132 his property back. He must have reasonable assur-
ance that he is to be compensated within a reasonable
time. It is said, and truly said, and sometimes said
with shame, that municipalities and political corpora-
tions repudiate their obligations and that courts enable
them to do so. Generally such holdings are in cases
where the indebtedness was unconstitutional and void.
There are cases, one of which is from Kansas, where,
after getting value received, the indebtedness was
successfully repudiated. Other states have like hold-
ings of their courts. But under the statute under
which we are now proceeding, this can never be, ex-
cept by the wrongful diversion of the moneys now on

hand and the successful resistance to the powers of taxation. It cannot be presumed that the officers of this drainage district will commit a crime which will subject them to indictment and imprisonment by the wrongful diversion of the money now on hand, for other purposes. Whether there is now money on hand with the county treasurer which could be checked out by this drainage board in a sufficient amount to pay all the expenses for widening and straightening the stream, is not made known. But it has been made known that there is now in cash with the county treasurer, several hundred thousand dollars for the purposes of paying the land owners for lands taken from them. It will be presumed that the money will be safely kept there until legitimately paid out. If there is a deficiency, the statute provides for the raising of the balance by taxation and the writ of mandamus would issue to compel such taxation. It is only by conjecture that these things will not be brought about, and this law observed by the officers of the drainage board. It seems to me that these things are too remote to warrant this court in holding that the compensation is not already secured.

133

134

I can serve no useful purpose by extending this opinion. I have purposely avoided all references to the decisions of state courts, for reasons already stated. A great many authorities could be added, and some authorities can be cited, apparently in conflict with these views. I have not even noticed a great many of supposed reasons that may arise, showing wherein this statute provides for an unlawful classification, and wherein the Fourteenth Amendment may be violated. Suffice it to say that most of those reasons are technical in the extreme, and are of and supposed reasons affecting other parties not to this litigation, and supposed reasons that may never arise.

135

I repeat, that this drainage district has the constitutional right of taking these properties. In taking such properties the drainage district is acting in part under the power of eminent domain and is acting in part in the exercise of the police power. The drainage district has these rights, and to which the owners

136 of the real estate must submit. On the other hand, the owners of these tracts of real estate have the right to have compensation and this compensation must be reasonably secured to them. The amount of the compensation must be determined by judicial proceedings. The money is on hand. The bonds therefor are yet unsold, and the power of taxation of more than forty millions in value of property, in my opinion, favors a reasonable assurance that they will be paid such amounts as may be determined and which can be determined within a reasonable period of time. If it were made to appear to this court that these moneys on hand were likely to be diverted, then this court would be in a position, by an amended bill, to see to
137 it that such moneys were placed within the registry of this court, from which payment could be made so soon as the amounts are ascertained. Parties must not forget that this is a court of equity, and that the powers of a court of equity are very great, to the end that justice may be done to all parties and injustice done to no one.

The demurrers to these bills of complaint will not now be passed on. It may be that other matters will be carried into these bills of complaint by amendments. It may be that other orders will become necessary.

Fully believing that I am both within the letter and the spirit of Section 17 of the Commerce Act, and with reference to injunctions as against state stat-
138 utes, the decree of this court is in effect that the statute is not invalid, and there is therefore no necessity for calling in two other judges to assist in the determination of this question. The remedy is adequate for having my views, if erroneous, readily corrected by an appellate court.

The restraining orders heretofore issued are vacated, and the applications for interlocutory injunctions are denied.

March 6, 1911.

Supreme Court of the United States.

OCTOBER TERM, 1910.

NUMBER 19. ORIGINAL.

IN THE MATTER
OF
THE APPLICATION OF METROPOLITAN WATER COMPANY OF WEST VIRGINIA FOR A WRIT OF MANDAMUS DIRECTED TO THE HONORABLE SMITH McPHERSON, ACTING DISTRICT JUDGE OF THE UNITED STATES FOR THE DISTRICT OF KANSAS, AND DIRECTED TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

Motion That the Rule Granted by This Court on April 10th, 1911, Be Made Absolute, and That a Writ of Mandamus Be Issued as Prayed in the Petition.

WILLARD P. HALL,
Attorney for Petitioner,
New York Life Building,
Kansas City, Missouri.

C. F. HUTCHINGS,
Dwight Building,
Kansas City, Missouri;

O. L. MILLER,
Husted Building,
Kansas City, Kansas,
Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

IN THE MATTER

OF

THE APPLICATION OF METROPOLITAN WATER COMPANY OF WEST VIRGINIA FOR A WRIT OF MANDAMUS DIRECTED TO THE HONORABLE SMITH McPHERSON, ACTING DISTRICT JUDGE OF THE UNITED STATES FOR THE DISTRICT OF KANSAS, AND DIRECTED TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

Comes now petitioner, by its attorney, and moves the court to make absolute the rule issued by it on April 10th, 1911, and to make an order for the issuance of a writ of mandamus as prayed in the petition filed herein, directing the Honorable Smith McPherson, Acting District Judge of the United States for the District of Kansas, and the Circuit Court of the United States for the District of Kansas, to annul and set aside the order of March 6th, 1911, vacating the restraining order theretofore issued on February 8th, 1911, and denying the application for injunction, and to call to the assistance of the Honorable Smith McPherson or such other judge of the said Circuit Court as may hear and determine the application for injunction, two other judges, as provided by Section 17 of the Act of Congress approved

June 18, 1910, because the return of the Honorable Smith McPherson to the rule issued by this Court on April 10th, 1911, shows no good and sufficient reason why said peremptory writ of mandamus should not be awarded.

WILLARD P. HALL,
Attorney for Petitioner.

C. F. HUTCHINGS,
O. L. MILLER,
Of Counsel.

To Lewis W. Keplinger and Charles W. Trickett, appearing as counsel for Honorable Smith McPherson:

You are hereby notified that the above motion will be filed at once in the office of the Clerk of the Supreme Court of the United States, and will be called up and submitted to said court on Monday, April 24th, 1911.

WILLARD P. HALL,
Attorney for Petitioner.

C. F. HUTCHINGS,
O. L. MILLER,
Of Counsel.

We hereby acknowledge the receipt of a copy of the above motion and notice this 18th day of April, 1911.

.....,

.....,

Authorized to Appear as Counsel for Honorable Smith McPherson.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

NO. 19, ORIGINAL.

IN THE MATTER

OF

THE APPLICATION OF METROPOLITAN WATER COMPANY OF WEST VIRGINIA FOR A WRIT OF MANDAMUS DIRECTED TO THE HONORABLE SMITH McPHERSON, ACTING DISTRICT JUDGE OF THE UNITED STATES FOR THE DISTRICT OF KANSAS, AND DIRECTED TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

Brief In Support of Motion to Make Absolute the Rule Issued by This Court on April 10th, 1911, and to Issue a Writ of Mandamus as Prayed in Petition.

WILLARD P. HALL,
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New York Life Building,
Kansas City, Missouri.

C. F. HUTCHINGS,
Dwight Building,
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O. L. MILLER,
Husted Building,
Kansas City, Kansas,
Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

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THE APPLICATION OF METROPOLITAN WATER COMPANY OF WEST VIRGINIA FOR A WRIT OF MANDAMUS DIRECTED TO THE HONORABLE SMITH McPHERSON, ACTING DISTRICT JUDGE OF THE UNITED STATES FOR THE DISTRICT OF KANSAS, AND DIRECTED TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF IN SUPPORT OF MOTION FOR ABSOLUTE RULE AND WRIT OF MANDAMUS.

This is an application that the rule granted by this court on April 10th, 1911, directing that cause be shown by the Honorable Smith McPherson, acting District Judge of the United States for the District of Kansas, and the Circuit Court of the United States for the District of Kansas, why a writ of mandamus should not be granted as prayed in the petition filed herein, that is to say, why

such writ should not be granted commanding said judge and said court, and each of them, to annul and set aside the order of March 6th, 1911, vacating the restraining order theretofore issued on February 8th, 1911, and denying the application for injunction, and to proceed to call to the assistance of the Honorable Smith McPherson, or such other judge of said Circuit Court as may hear and determine the application for injunction, two other judges as provided in Section 17 of the Act of Congress approved June 18th, 1910, be made absolute, and that such writ of mandamus be granted.

The ground of this application is that the return made by the Honorable Smith McPherson to the rule issued by this court on April 10th, 1911, shows no good and sufficient reason why the writ of mandamus should not be awarded.

The return to the rule admits all the facts alleged in the petition for a mandamus, referring to the exhibits attached thereto and making them parts of the return; states only one additional fact of which further mention will be made hereinafter shortly; and submits to such orders as this court may make in the premises.

The return, and the exhibits aforesaid made parts of it show the following state of case:

Petitioner filed a bill of complaint on February 3rd, 1911, in the United States Circuit Court for the District of Kansas asking for injunctive relief, temporary and permanent, against the Kaw Valley Drainage District of Wyandotte County, Kansas, and the members of its board of directors, restraining and enjoining them from

taking possession of petitioner's lands, described in the bill, under an Act of the State of Kansas approved January 28th, 1911, on the ground that said Act was unconstitutional (Exhibit B annexed to petition herein, pp. 12-26).

Petitioner, on February 8th, presented its application for a temporary injunction to Judge Smith McPherson who was acting in the place of the regular district judge under proper assignment, (Respondent's return), and he issued a restraining order and set the application for a temporary injunction for hearing on February 18th (Exhibit C annexed to petition, p. 79).

A hearing was had before Judge McPherson on February 18th, but it was confined to the question as to whether or not Section 17 of the Act of Congress approved June 18th, 1910, applied to the application for a temporary injunction made by petitioner. Counsel for defendants in the bill of complaint took the affirmative of that question, petitioner's attorney took the negative of it (Respondent's return; Judge McPherson's opinion of February 20th, 1911, Exhibit D annexed to petition, p. 30)—The additional fact stated in respondent's return hereinbefore referred to is that petitioner's attorney on February 18th argued that Section 17 of said Act of Congress did not apply to petitioner's application for injunction.

The Act of Kansas attacked as unconstitutional is annexed to the petition herein as Exhibit A (pp. 6-11). Section 3 of said Act provides that the Governor of Kansas shall take possession of the lands described in the Act,

with the proviso, however, that he may appoint as agents of the state, to take and hold possession for and in the name of the state, the board of directors of the drainage district in which the lands are situated. It was by reason of that provision that Judge McPherson held in a written opinion read by him on March 6th that, though the bill of complaint asked for no relief against any officer of the state by name and asked only for an injunction against the Kaw Valley Drainage District and its board of directors restraining them from taking possession of the petitioner's lands under said Act of Kansas, the necessary effect of such injunction would be to prevent said board of directors from receiving possession of said lands from the governor, and, therefore, to prevent the governor from giving such possession to said board of directors, and thereby to restrain an officer of the state in the enforcement of said Act of Kansas, in the meaning of Section 17 of said Act of Congress (Opinion of March 6th, 1911, Exhibit D attached to the petition, pp. 28-34). The language of the opinion on this point is as follows:

> "Neither have I any doubt that the action is to restrain the action of an officer of the State of Kansas, namely, the Governor. This is so because the state statute in question provides that when the governor issues his proclamation, which he has done, he shall at once take possession of the property either in person, or he may designate the officers of the drainage board to take possession for him and in his name, but such officers of the drainage board to act as agents of the governor. Therefore, I am of the opinion that the congressional statute is directly involved" * * * (pp. 31-32).

In said opinion, however, Judge McPherson further held that though Section 17 of said Act of Congress applied to the application for a temporary injunction, he was not required by the terms of such section to call two other judges to assist him in hearing and determining said application, unless upon first hearing the application without such assistance he should be persuaded that there was reason for believing that the Act of Kansas was unconstitutional. He construed Section 17 to prohibit a single judge of a Circuit Court of the United States from enjoining the enforcement of a statute of a state by any officer thereof on the ground of the unconstitutionality of the statute, and to require any such judge to whom an application for a temporary injunction for that purpose might be presented to call to his assistance two other judges to hear and determine the application, before such application should be granted; but not to prohibit a single judge to whom such application might be presented from denying it. He said that a single judge could not adjudge a statute of a state to be unconstitutional, but that he could adjudge it to be constitutional (pp. 33-34).

Judge McPherson accordingly invited argument by opposing counsel for the purpose of aiding him in deciding whether, under his construction of Section 17 of the Act of Congress, he ought to call two other judges to assist him, or whether he should adjudge the Act of Kansas constitutional and should vacate the restraining order theretofore issued by him and should deny a temporary injunction. The language of the opinion in this regard is as follows:

"If after argument as to the validity or invalidity of this state statute, I should reach the conclusion that the state statute is valid, then we have reached the end of the matter, subject to a reversal or modification by the Appellate Court. And if I reach such conclusion, the restraining order heretofore issued will be vacated, and the interlocutory injunction denied. In that event the case can be carried to the Supreme Court, and if in the end the statute should be overthrown, it would be so done by that court composed of nine justices.

"If, upon the other hand, after argument, I am persuaded that there is reason for believing that the state statute is valid, I will make the designation of two other judges to take part in the hearing of the case and a re-argument will be made and the question determined.

I will now hear arguments on the question as to the constitutionality of this Kansas State Statute" (p. 34).

Arguments were heard by Judge McPherson in accordance with his opinion of February 20th. The real question for decision by him was whether he should call in two other judges as provided in Section 17 of said Act of Congress. He had held that, sitting alone, he could not adjudge the Act of Kansas to be unconstitutional, but he had declined to call in two other judges only on condition that he should reach the conclusion, after hearing arguments on the objections made by petitioner to the constitutionality of said Act, that there was good reason for believing said Act to be unconstitutional. Petitioner's attorney yielded to and acquiesced in the ruling by Judge McPherson that Section 17 of said Act of Congress applied and that he, sitting alone, could not adjudge

the Act of Kansas unconstitutional, and sought to persuade him to call in two other judges by convincing him him that the Act of Kansas was unconstitutional, and in the brief filed urged him to call in two other judges (Petition herein, pp. 3-4; Judge McPherson's return).

After the last mentioned arguments were heard Judge McPherson took the matter under advisement and later, on March 6th, 1911, filed a second written opinion stating his conclusions and directing appropriate orders to be made to carry them into effect. A copy of said opinion is annexed to the petition filed herein (pp. 34-46), and as there printed is made by Judge McPherson a part of his return. In that opinion he held the Act of Kansas to be constitutional and refused to call in two other Judges, and ordered that the restraining order previously issued by him be vacated and a temporary injunction denied. The portion of the opinion refusing to call in two other judges reads of follows:

> "Fully believing that I am within the letter and spirit of Section 17 of the Commerce Act, and with reference to injunctions as against state statutes, the decree of this court is in effect that the statute is not invalid, and there is therefore no necessity for calling in two other judges to assist in the determination of this question. The remedy is adequate for having my views, if erroneous, readily corrected by an Appellate Court" (Petition, p. 46).

Two questions arise on Judge McPherson's return: 1. Did Section 17 of the Act of Congress creating the Commerce Court, approved June 18, 1910, apply to the application for temporary injunction presented by petitioner to Judge McPherson? 2. If said statute did apply, did Judge McPherson have any discretion about calling in two other judges as therein provided to assist him in hearing and deciding said application?

BRIEF.

I.

SECTION 17 OF THE ACT OF CONGRESS CREATING THE COMMERCE COURT APPROVED JUNE 18, 1910, APPLIED TO PETITIONER'S APPLICATION FOR A TEMPORARY INJUNCTION.

Section 17 of said Act of Congress reads as follows:

> "That no interlocutory injunction suspending or restraining the enforcement, operation or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute shall be issued or granted by any justice of the Supreme Court, or by any Circuit Court of the United States, or by any judge thereof, or by any district judge acting as circuit judge, upon the ground of unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit judge, or to a district judge acting as circuit judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court of the United States or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court of the United States, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges; Provided, however, that one of such three judges.

shall be a justice of the Supreme Court of the United States or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the state, and to such other persons as may be defendants in the suit: Provided, that if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court of the United States, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall only remain in force until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken directly to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case" (U. S. Stat. at Large, 1910, part 1, p. 557).

Judge McPherson correctly held that this petitioner's application for a temporary injunction against the drainage district came within said Section 17, for the reason that while it is true that that section applies only to interlocutory injunctions "suspending or restraining the enforcement, operation or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute," and petitioner's application asked directly for no

injunction against any officer of the State of Kansas, still an injunction against the drainage district would have prevented the governor of that state from enforcing and executing the Act of Kansas of 1911. That Act in effect, required the governor to put the drainage district in possession of the lands described in the Act; the Act was passed for the very purpose of putting the drainage district in possession of those lands, and an injunction preventing the drainage district from receiving possession thereof from the governor would effectually have restrained him from giving possession to it.

After Judge McPherson's first opinion was read, we became convinced that our original contention to the contrary was erroneous and that he was right, and we acquiesced in his position that Section 17 of said Act of Congress applied.

II.

JUDGE McPHERSON HAD NO DISCRETION ABOUT CALLING IN TWO OTHER JUDGES TO ASSIST HIM IN HEARING AND DECIDING PETITIONER'S APPLICATION FOR INJUNCTION. SECTION 17 OF SAID ACT OF CONGRESS MADE IT HIS ABSOLUTE DUTY TO DO SO.

Section 17 of said Act of Congress applies to all applications for a temporary injunction presented to a single judge which comes within the purpose and intent of the Act. The Act makes no exception whatever. The judge can make no exception. He must obey the mandate of the Act in all cases. It matters not what personally he may think about the merits of the objections

made against the constitutionality of the state statute. He, sitting alone, has no power to pass upon such objections, or to do anything but call two other judges to his assistance. Said section provides that whenever an application for a temporary injunction covered by the terms of the section (the words of the section are "whenever such application as aforesaid) is presented to a single judge (the words of the section are "is presented to a justice of the Supreme Court of the United States, or to a judge)," "he shall immediately call to his assistance to *hear and determine the application,* two other judges." The single judge, sitting alone, has no power to hear or determine the application. He must call in two other judges. His discretion extends only to the selection of the two other judges.

The fact that petitioner's attorney at the first hearing before Judge McPherson, *i. e.,* at the hearing upon the question as to whether Section 17 of said Act of Congress applied to the application for a temporary injunction argued that it did not apply, did not deprive petitioner of the right at the second hearing, *i. e.,* the hearing upon the question as to whether two other judges should be called in, to request that two other judges be called in. 1. Petitioner could not enlarge the jurisdiction of Judge McPherson, sitting alone, beyond the restrictions of the Act of Congress. 2. Judge McPherson did not accept the position contended for by petitioner's attorney, but, on the contrary, he held the very reverse thereof, viz., that said section did apply. Petitioner had the right to acquiesce in the adverse ruling, and this it did.

Petitioner, however, never acquiesced in Judge McPherson's ruling that, sitting alone, he had the power to deny petitioner's application, but not the power to grant it. On the contrary, petitioner's attorney asserted petitioner's right to a hearing of its application before a tribunal clothed with the power to grant it, and urged Judge McPherson to call in two other judges as provided in said Act of Congress. The entire argument on behalf of petitioner was directed to that end. Judge McPherson in his first opinion had held that, without the assistance of two other judges, he could not and would not grant petitioner's application, and petitioner's attorney used every effort to induce him to call in two other judges to sit with him and hear said application in order that it might be granted by the three judges. On the second argument Judge McPherson was not asked sitting alone to grant the application. He was urged to call in two other judges.

III.

HAD JUDGE McPHERSON CALLED TWO OTHER JUDGES TO HIS ASSISTANCE AS PROVIDED IN SECTION 17, AND HAD THE THREE JUDGES VACATED THE RESTRAINING ORDER THERETOFORE ISSUED AND HAD DENIED THE TEMPORARY INJUNCTION, THIS PETITIONER WOULD THEN HAVE HAD THE RIGHT OF APPEAL TO THIS COURT, BUT NO APPEAL LIES TO THIS OR ANY OTHER COURT FROM THE ORDER MADE BY JUDGE McPHERSON, AND MANDAMUS BY THIS COURT IS THE ONLY REMEDY OF THIS PETITIONER TO CORRECT JUDGE McPHERSON'S REFUSAL TO CALL TWO OTHER JUDGES TO HIS ASSISTANCE.

Section 17 provides that:

> "An appeal may be taken directly to the Supreme Court of the United States from the order granting or denying *after notice and hearing*, an interlocutory injunction in such case."

Said section provides no other appeal.

If said section applies, this petitioner's right of appeal could be only to this court, and only after hearing before three judges as provided in said section.

If said section does not apply, then this controversy is at an end. But even then this petitioner could not have appealed from the order made by Judge McPherson, for the reason that, aside from Section 17, no appeal lies from an order denying an interlocutory injunction.

31 Stat. at Large, 660.
Heinze v. *Butte, etc. Minn. Co.*, (C. C. A.) 107 Fed. Rep. 165.

There was, therefore, no appeal from Judge McPherson's order of March 6, 1911.

Mandamus is the proper remedy for this court to use to compel a judge of the Circuit Court or said court to hear and determine a matter within this court's appellate jurisdiction, so that the matter may come here for review, and if necessary to that end, to compel the making of all necessary orders, including an order to reinstate a matter wrongly dismissed, or an order vacating an order wrongly made.

Insurance Co. v. *Comstock*, 16 Wall. 258, 270.
Ex Parte Bradstreet, 7 Pet. 634.
In re Pennsylvania Co., 137 U. S. 451, 452.

McClellan v. *Carlan*, 217 U. S. 268.
In re Winn, 213 U. S. 458, 465-468.
In re Metropolitan Trust Co., 218 U. S. 312.

This consideration makes absolutely certain the correctness of our last previous proposition that Judge McPherson had no jurisdiction to refuse to call in two other judges, and, sitting alone, to vacate the restraining order or deny the application for a temporary injunction. To hold otherwise would permit a single judge to bottle up the complainant, by depriving him of the right of appeal granted by the Act of Congress.

It is no argument against our proposition to say that if a single judge must call in two other judges in all cases, these judges will be annoyed by many frivolous applications for injunction. The Act of Congress does not permit a single judge to decide that an application is frivolous, and, moreover, it is a sufficient penalty for a frivolous application to deny it.

Respectfully submitted,

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Of Counsel.

No. 19 Orig.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.
(ORIGINAL.)

IN THE MATTER

OF

THE APPLICATION OF METROPOLITAN WATER COMPANY OF WEST VIRGINIA FOR A WRIT OF MANDAMUS DIRECTED TO THE HONORABLE SMITH McPHERSON, ACTING DISTRICT JUDGE OF THE UNITED STATES FOR THE DISTRICT OF KANSAS, AND DIRECTED TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION AND FOR RULE.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

IN THE MATTER
OF
The Application of METROPOLITAN WATER COMPANY OF WEST VIRGINIA for a Writ of Mandamus Directed to the Honorable SMITH McPHERSON, Acting District Judge for the District of Kansas, and Directed to the CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION AND FOR RULE.

STATEMENT.

This is an application for leave to file a petition for a writ of mandamus directed to the Honorable Smith McPherson, acting District Judge of the United States for the District of Kansas, and by virtue thereof acting as Judge of the Circuit Court of the United States in and for the District of Kansas, commanding said Judge to call two other judges, one of them to be a Circuit Judge

or a Justice of the Supreme Court, to assist him to hear and determine the application made to him by petitioner for an interlocutory injunction against the Kaw Valley Drainage District of Wyandotte County, Kansas, and the members of its Board of Directors, enjoining and restraining them from taking possession of petitioner's land under an Act of the State of Kansas, approved January 28th, 1911, on the ground that said Act is unconstitutional, and commanding said Judge and Court to expunge from the records of said court an order made on March 6th, 1911, vacating a restraining order theretofore issued by Judge McPherson on February 8th, 1911, and denying said application for an interlocutory injunction.

The history of the case is as follows:

Said drainage district was organized under the General Drainage Law of Kansas (Dassler's Gen'l Stat., Kans., 1909, Art 3, Ch. 34, Secs. 3000-3056; Laws Kans. 1905, Ch. 215), for the purpose of protecting the lower ten miles of the Kansas River from overflowing its banks and flooding the adjacent territory, by widening and deepening the river's channel. Numerous drainage districts have been formed under said law for the purpose of guarding against the overflow of various watercourses in said state by widening and deepening them. None of them is navigable except the Kansas River, which is theoretically navigable from its mouth to Topeka. Upstream from the drainage district involved herein, quite a number of drainage districts have been organized along the Kansas River, some beyond the point of navigability, others where the river was navigable. The latter dis-

tricts were, one at Lemate in Leavenworth County, one at Lawrence, and two at Topeka.

Under the General Drainage Law a drainage district has the power to appropriate private lands along any watercourse, whether navigable or non-navigable, which are needed for the purpose of widening such watercourse (Genl. Stat. Kans., *supra,* Sec. 3006, Sub. 4). The proceeding for appropriating said lands is fully provided by said law (*Id.,* Secs. 3038-3046).

Briefly stated, the proceeding prescribed requires a drainage district wanting private lands to cause the same to be surveyed and described by competent engineers, and then to cause an application in writing to be presented to a judge of either the district or common pleas court of the county for the appointment of three commissioners to appraise the value of the lands to be taken and to assess the damages caused by such taking. The commissioners give notice by publication of the time and place when and where damages will be assessed, and at such time and place they proceed with their duties, adjourning from time to time; they report in writing describing each owner's land, and separately assessing his damages. The landowner may appeal, but notwithstanding the appeal, the drainage district can pay the amount of the award to the County Treasurer, whereupon it becomes vested with the right to the perpetual possession and use of the land for the purposes of the district, to-wit, widening the channel of the watercourse to be protected against.

A drainage district is authorized by other sections of the general drainage law to employ competent engineers

to assist its board of directors in determining the nature and extent of the improvements, including the lands required to be taken, for the purpose of widening the watercourse and thereby preventing its overflow (Secs. 3015, 3017, 3018).

The only express provision contained in the General Drainage Law providing a means of paying for lands condemned or purchased is the 13th subdivision of Section 3006, which confers power on drainage districts to issue negotiable bonds for that purpose, such bonds to be payable by general taxation, provided that no such bonds shall be issued until authorized by a vote of the taxpayers. The 11th subdivision of said section limits the power of general taxation to an annual tax "not exceeding five mills on the dollar on all taxable property in the district."

The sections of the General Drainage Law hereinbefore specifically mentioned are printed as Appendix 1 to this brief.

The Kaw Valley Drainage District determined that the channel of the Kansas River would have to be widened for its entire length through the district, *i. e.*, ten miles, and that for five miles from its mouth upstream the new channel should be 734 feet wide, and it caused surveys and plans to be made locating lines on both sides of said river to produce a channel of that width. Both lines were outside of the present river and were on private lands. In some manner the War Department was induced to lend the aid of United States Engineers to the drainage district in determining the width of the river

for the last five miles of its length and to locate the lines for the new channel, and the lines when established became known as Federal or Government Harbor Lines. No harbor lines exist elsewhere in the state.

Said drainage district began condemnation proceedings under the General Drainage Law for taking private lands lying between said harbor lines and the river, on both sides of the river and thirty feet landward from said harbor lines. Several owners of the lands sought to be taken were non-residents of the State of Kansas and citizens of other states, and they separately caused the condemnation proceedings, so far as the same related to their lands, to be removed to the United States Circuit Court for the District of Kansas, and, the drainage district denying the fact or legality of the removals, such land owners procured temporary injunctions from said court in aid of the removals.

This petitioner was one of said land owners.

Thereupon the members of the Board of Directors of said drainage district and its attorneys prepared a bill and caused it to be introduced in the Legislature of Kansas, then in session, for the avowed purpose of taking the lands in controversy for the use of the drainage district without the delay of an appraisement of their value, and of providing such method of subsequently ascertaining that value as would deprive the non-resident owners of a trial thereon in the United States Circuit Court. That bill was passed by the Legislature, and was approved by the Governor on January 28th, 1911.

That bill hereinafter will be referred to as the Act of 1911.

That Act provided a new, but not exclusive remedy, concurrent with the existing remedy for condemning private lands for the use of drainage districts (Sec. 11). The new remedy was confined to drainage districts having navigable rivers running through them, on which harbor lines had been established by federal authority (Sec. 1), and having taxable property to the amount of not less than forty million dollars (Sec. 3); and, even in such districts, the new remedy was confined to the land lying between such harbor lines and forty feet landward therefrom—it did not apply to any other lands in such districts needed for widening the same navigable river, even when made at the same time and under the same contract.

That Act declared that all lands lying between such federal harbor lines and forty feet landward therefrom were necessary for the protection of the health, life and property of the people of the drainage district (Secs. 1 and 2), and directed the Governor to issue a proclamation appropriating all such lands and declaring the right to the possession thereof to be vested in the State of Kansas; and directed the Governor thereupon to take possession of said lands in the name and on behalf of the State, with the proviso, however, that he might "appoint and designate the board of directors of the drainage district in which said lands are situated as agents of the State to take and hold such possession for and on behalf of and in the name of the State." (Sec. 4).

That Act directed that immediately after the issuance of such proclamation by the Governor, the Attorney General of the State should commence an action in the District Court of the county wherein the lands are located, to be entitled "The State of Kansas vs. all persons having or claiming any interest in the land lying between the established harbor line of the ..... river and within a distance of forty feet landward therefrom within the ..... drainage district, and in ..... county," for the purpose of determining whether any of the lands taken belong to private persons or corporations, and if so, to determine the value thereof. The Act provided for notice of said action by publication for at least forty-one days, and made that action exclusive. All parties claiming to own any of said lands were required to appear in said action within said time, or forever be barred from asserting title to any of said lands (Sec. 5).

The Act provided that any judgment obtained by a land owner in such action should be a lien upon all the taxable property in the drainage district; that said judgment should be payable out of the funds of the drainage district; that if there were not sufficient funds, a tax should be levied, no limit of taxation being fixed, or bonds be issued, no referendum to the taxpayers or people being required (Sec. 6).

Said Act is printed as Appendix 2 to this brief.

After the approval of the Act of 1911, and prior to the issuance by the Governor of his proclamation, this petitioner filed a bill of complaint in the office of the

clerk of the United States Circuit Court for the District of Kansas, at Topeka, asking for injunctive relief, temporary and permanent, against said drainage district and the members of its board of directors, enjoining and restraining them from taking possession of petitioner's lands under said Act, on the ground that it was unconstitutional because special legislation and illegally discriminatory against petitioner and the other non-resident land owners who had removed the first condemnation proceedings (still pending undisposed of) to the United States Circuit Court as hereinbefore stated, and because it deprived petitioner and the other non-resident land owners of their property without due process of law.

The application for temporary injunction was presented on February 8th, 1911, to the Honorable Smith McPherson, District Judge of the United States for the Southern District of Iowa, assigned to the District of Kansas and acting for the regular judge in the latter's absence. Judge McPherson issued a restraining order, and set the application for a temporary injunction for hearing before the regular judge on February 18th, 1911. On the latter date Judge McPherson appeared and announced that he would hear the application for a temporary injunction.

Thereupon counsel for defendants in the bill of complaint requested Judge McPherson to call two other judges, one of whom should be either a Circuit Judge or Justice of the Supreme Court, to aid him in hearing and determining the application for a temporary injunction.

on the ground that said application came within the provisions of Section 17, of the Act of Congress, 1910, creating the Commerce Court.

Judge McPherson took such request under advisement, and on February 20th, 1911, read an opinion in which he said that the application for a temporary injunction did come within said Section 17, and that, sitting alone, he had no power to grant the application and issue a temporary injunction, but that he had the power to deny the application and refuse to issue the injunction; that he did not have the power to declare the Act of Kansas of 1911 unconstitutional, but that he did have the power to declare it constitutional; that he ought not to call two other judges to assist him unless there was substantial reason for believing said Act to be unconstitutional; and that he would hear argument on the question of the constitutionality of the Act.

Judge McPherson afterwards heard arguments on the question of the constitutionality of said Act. Counsel for this petitioner in his brief asked Judge McPherson to call two other judges to assist him in hearing and deciding the application for a temporary injunction, and to give petitioner an opportunity to give the notices required by said Section 17.

Judge McPherson filed an opinion on March 6th, 1911, in which he refused to call two other judges to his assistance, in which he held the Act of Kansas of 1911 to be constitutional, and in which he ordered the restraining order previously issued by him to be vacated, and a temporary injunction denied.

POINT I.

Section 17 of the Act of Congress Creating the Commerce Court Applied to Petitioner's Application for a Temporary Injunction.

Judge McPherson correctly held that this petitioner's application for a temporary injunction against the drainage district came within said Section 17, for the reason that while it is true that that section applies only to interlocutory injunctions "suspending or restraining the enforcement, operation or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute," and petitioner's application asked directly for no injunction against any officer of the State of Kansas, still an injunction against the drainage district would have prevented the Governor of that State from enforcing and executing the Act of Kansas of 1911. That Act, in effect, required the Governor to put the drainage district in possession of the lands described in the Act; the Act was passed for the very purpose of putting the drainage district in possession of those lands, and an injunction preventing the drainage district from receiving possession thereof from the Governor would effectually have restrained him from giving possession to it.

POINT II.

Judge McPherson Had No Discretion About Calling in Two Other Judges to Assist Him in Hearing and Deciding Petitioner's Application for Injunction. Section 17 of said Act of Congress Made It His Absolute Duty to Do So.

Section 17 of said Act of Congress applies to all

applications for a temporary injunction presented to a single judge which come within the purpose and intent of the Act. The Act makes no exception whatever. The judge can make no exception. He must obey the mandate of the Act in all cases. It matters not what personally he may think about the merits of the objections made against the constitutionality of the state statute. He, sitting alone, has no power to pass upon such objections, or to do anything but call two other judges to his assistance.

Section 17, so far as pertinent, reads as follows:

> "Whenever such application as aforesaid is presented to a Justice of the Supreme Court of the United States, or to a Judge, he shall immediately call to his assistance to hear and determine the application, two other Judges; provided, however, that one of such three Judges shall be a Justice of the Supreme Court or a Circuit Judge. Said application shall not be heard or determined before at least five days of the hearing has been given to the Governor and to the Attorney-General of the state, and to such other persons as may be defendants in the suit."

It may be said, however, that the objections made to the Act of Kansas of 1911 were of the gravest and most substantial character. Said Act is unique in the history of the country. Said Act discriminates illegally both against the owners of lands touched by federal harbor lines and against the general taxpayers in the only drainage district in Kansas that does, or in the nature of things, probably ever will include any land touched by such lines. There is nothing in the fact that officers

of the United States Army have approved a portion of the lines adopted by a drainage district for the new and wider channel of a navigable river to distinguish the lands touched by that portion of said lines from the lands touched by the balance of said lines. And there can be nothing in such approval of a portion of said lines that would justify the state in taking lands touched by that portion of the lines without an appraisement of the value of said lands and the payment thereof to the owners first had and made, whereas, no other lands can be taken by the state without the value thereof first being ascertained and paid. Such distinction is arbitrary and fanciful. It is equally arbitrary and fanciful to say, in effect, that non-resident owners of lands not touched by such portion of said lines shall be permitted to have the question of the value of such lands decided in the courts of the United States, but that nonresident owners of lands touched by such portions of said lines shall not enjoy that privilege. And there is no reason why the drainage district that contains such portion of said lines should have unlimited power to levy taxes and issue bonds to pay for lands touched thereby, while every other drainage district's power to levy taxes should be limited to five mills on the dollar, and its power to issue bonds depend upon the approval of its taxpayers expressed at an election held for that purpose. This last point equally affects owners of lands taken under said Act and general taxpayers, for the reason that if the provisions of said Act securing payment of judgments rendered in favor of the land owners are

void, then they have no means of enforcing payment of such judgments except those provided in the General Drainage Law, to-wit, an annual levy of a tax of five mills on the dollar and the issuance of bonds on the approval of the taxpayers. The tax levy might be inadequate; the taxpayers might refuse their approval.

POINT III.

Had Judge McPherson Called Two Other Judges to His Assistance as Provided in Section 17, and Had the Three Judges Vacated the Restraining Order Theretofore Issued and Had Denied the Temporary Injunction, This Petitioner Would Then Have Had the Right of Appeal to This Court, But No Appeal Lies to This or Any Other Court from the Order Made by Judge McPherson, and Mandamus by This Court Is the Only Remedy of This Petitioner to Correct Judge McPherson's Refusal to Call Two Other Judges to His Assistance.

Section 17 provides that:

> "An appeal may be taken directly to the Supreme Court of the United States from the order granting or denying, *after notice and hearing*, an interlocutory injunction in such case."

Said section provides no other appeal.

If said section applies, this petitioner's right of appeal could be only to this court, and only after hearing before three judges as provided in said section.

If said section does not apply, then this controversy is at an end. But even then this petitioner could not have appealed from the order made by Judge McPherson, for the reason that, aside from Section 17, no ap-

peal lies from an order denying an interlocutory injunction.

31 Stat. at Large, 660.
Heinze v. *Butte, etc., Min. Co.*, (C. C. A.) 107 Fed. Rep. 165.

There was, therefore, no appeal from Judge McPherson's order of March 6, 1911.

Mandamus is the proper remedy for this court to use to compel a judge of the Circuit Court or said court to hear and determine a matter within this court's appellate jurisdiction, so that the matter may come here for review, and if necessary to that end, to compel the making of all necessary orders, including an order to reinstate a matter wrongly dismissed, or an order vacating an order wrongly made.

Insurance Co. v. *Comstock*, 16 Wall. 258, 270.
Ex parte Bradstreet, 7 Pet. 634.
In re Pennsylvania Co., 137 U. S. 451, 452.
McClellan v. *Carlan*, 217 U. S. 268.
In re Winn, 213 U. S. 458, 465-468.

Respectfully submitted,

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Of Counsel.

Dated March 17, 1911.

New York Life Building,
Kansas City, Missouri.

APPENDIX 1.

Sections of General Drainage Law of Kansas specifically mentioned in foregoing brief, as found in Dassler's General Statutes of Kansas, 1909.

"SECTION 3006. *General Powers of District.* Sec. 39.—That each drainage district incorporated under the provisions of this act shall be a body politic and corporate, and (subject to the superior jurisdiction of the United States over navigable waters) is hereby granted exclusive control of the beds, channels, banks and of all lands the title to which is vested in the State of Kansas, lying between the banks at high water mark of all natural water courses within such district. And every drainage district so incorporated shall have power—"

* * * * * * *

"Fourth. To take charge of and exercise exclusive control over all natural water courses within its territorial limits, and to so widen, deepen, establish, regulate and maintain the channels thereof, and to construct and maintain such levees along the banks thereof as may be deemed necessary or proper to prevent or restrain overflow or lessen the volume thereof or the injury deemed likely to result therefrom; also to make and maintain such ditches, drains, sewers and canals through lands subject to overflow as may be deemed necessary to carry off and prevent water from standing or remaining in pools or ponds and becoming stagnant upon overflowed lands, or as may be deemed necessary for sanitary purposes or conducive to the public health, convenience, and welfare; also to alter, change or abandon the channel or any part of the channel of any natural water course and relocate or excavate and establish a new channel for such watercourse or any part thereof situated within the district, and to these ends may take private property for

public use by exercise of the right of eminent domain in the manner hereinafter provided; and may condemn and cause obstructions in such water courses to be removed; and may acquire by gift, purchase or condemnation such lands for the purpose of constructing levees along or widening, deepening, changing or otherwise improving the channels of such water courses, or for relocating, excavating and establishing new channels or constructing cut-offs, as may be deemed necessary."

* * * * * * *

"Eleventh. To annually levy and collect a general tax not exceeding five mills on the dollar on all taxable property within the district, to create a general fund."

* * * * * * *

"Thirteenth. To issue negotiable bonds to pay the cost of widening, deepening and otherwise improving the channels and constructing embankments, drains, and levees and other works along the banks of natural water courses, to pay for the purchase or condemnation of land necessary therefor, to prevent overflow and protect the property situated within the district from damage and injury thereby; such bonds to be payable by general taxation of all property within the district when it shall be determined that all property situated within the district will be benefited thereby or that such work or improvements is necessary, or will be conducive to the public health, convenience or welfare, and beneficial to all of the inhabitants of such district; *Provided*, That no such bonds shall be issued until authorized by a vote of the taxpayers, as hereinafter provided."

* * * * * * *

"SECTION 3038. *Proceeding When Railroad Entitled to Compensation.* Sec. 71.—That whenever it shall be deemed necessary to construct any levee across the right of way of any railroad company, and such railroad company shall be entitled to compensation therefor, the board of directors shall have the power to make such crossing or to condemn and appropriate so much

of such right of way or land as may be necessary for that purpose in the manner hereinafter provided and whenever it shall be deemed necessary to appropriate any private property for use by the district in widening, deepening or otherwise improving any natural water course to prevent the overflow thereof, or for the construction of any levee, canal, drain or other work, the board of directors shall cause a survey and description of the land so required out of the right of way or lands of such railroad company or out of the lands of any private owner to be made by some competent engineer and filed with its secretary, and thereupon shall make an order declaring that the appropriation of such land is necessary and setting forth for what purpose the same is to be used. The board of directors, as soon as practicable thereafter, shall present a written application to the judge of the District Court or of the Court of Common Pleas of the county in which said land is situated, describing the land sought to be taken and setting forth that the appropriation thereof is necessary for the use of the district, and praying for the appointment of three commissioners to make appraisement and assessment of damages therefor. Upon the presentation of such petition by such board of directors or its attorneys, the judge to whom the same is presented shall forthwith appoint such commissioners. Such appointment shall be made in writing, under the hand of the judge, and delivered to the said board of directors or its attorney, who shall without delay cause such application and certificate of appointment to be recorded in the office of the register of deeds of the proper county, and in case any person so appointed refuses or fails to serve as such commissioner for any reason, the said judge, upon application, shall appoint some other person having the proper qualifications to fill such vacancy. Such commissioners shall be sworn to honestly and faithfully discharge their duties as such commissioners. (*Id.*, Sec. 39).

SECTION 3039. *Notice to Railroad; Proceeding.* Sec. 72.—The commissioners appointed under the next preceding section shall give any railroad company or other owners of the property sought to be taken at least ten days' notice in writing of the time and place when and where the damage will be assessed, by one publication in some newspaper published in such county, and at the time fixed by such notice shall upon actual review appraise the value of the lands taken and assess the other damages done to the owners of the property respectively by such appropriation. The said commissioners may adjourn as often and for such length of time as may be deemed convenient, and may during any adjournment perfect or correct all errors or omissions in the giving of notice by serving new notices or making new publication, citing corporations or individual property owners who have not been notified or to whom defective or insufficient notice has been given, and notice of any adjourned meeting shall be as effective as notice of the first meeting of the commissioners; and the commissioners may from time to time make partial reports, and upon completing their duties shall make a final report. All reports shall be in writing and filed in the office of the clerk of such county. Notice to any railroad company or other corporation may be served upon any officer or agent thereof or upon any other owner, if found within the district, in lieu of such notice by publication. (*Id.*, Sec. 40).

SECTION 3040. *Commissioners' Report.* Sec. 73.—That said commissioners shall in their reports accurately describe the lands by them set off and appropriated, the purpose for which the same are taken, the name of each owner, if known, and shall apprise (appraise) each owner's interest and assess his damages separately, if his title can be ascertained from the public records in the office of the register of deeds; and if the right to construct a levee across the route or right-of-way or other lands

of any railroad or street railroad company shall be appropriated, the point where such crossing is to be made shall be distinctly specified (*Id.*, Sec. 41).

SECTION 3041. *Duty of Clerk and Treasurer.* Sec. 74.—That the county clerk shall forthwith, upon any report being filed in his office, prepare and deposit a copy thereof in the office of the treasurer of such county, and if such drainage district shall cause to be paid to such treasurer the amount in full of such appraisement within ninety days of the time of filing such copy in such treasurer's office, such treasurer shall thereupon certify such fact upon the copy of the report, under his hand and seal of office, and shall upon demand of the persons severally entitled thereto, pay over the amounts of such fund to such persons as shall be respectively entitled thereto (*Id.*, Sec. 42).

SECTION 3042. *Report Filed; Right Perpetual.* Sec. 75.—That if such drainage district shall cause the copy of the report so certified to be within ten days after such certifying filed and recorded in the office of the register of deeds of such county, the right to the perpetual use of all lands shown by such report to have been appropriated shall vest in such district for the purpose for which the same were condemned and taken as stated in such report, and said district shall have the right forthwith to construct a levee across the right-of-way of any railroad or street railroad company at the point specified in such report, and to occupy all other lands which by the terms of said report were by said commissioners set off and appropriated for its use and benefit (*Id.*, Sec. 43).

SECTION 3043. *Appeal from Award.* Sec. 76.—That any person being or claiming to be the owner of any land so condemned or appropriated, and deeming himself aggrieved by the decision or award of said commissioners, may appeal from their award as to the value of the land, crops, buildings and other improvements

thereon, and for all other damages sustained by such person by reason of the appropriation of such lands, in the same manner as appeals are granted from the judgment of a justice of the peace to the District Court, but said appeal and all subsequent proceedings shall only affect the amount of compensation to be allowed and shall not delay the prosecution of the work by such district, upon its paying or depositing the amount so assessed by said commissioners with the county treasurer of the county within which the said lands are situated, and upon the payment or deposit as aforesaid of the money so assessed by said commissioners; and upon said district executing a bond with sufficient surety, to be approved by the county clerk, to pay all damages and costs which said district may be adjudged to pay by said District Court said district may, notwithstanding such appeal, take possession of, appropriate and use said land for the purposes for which it was so condemned (*Id.*, Sec. 44).

SECTION 3044. *District May Appeal.* Sec. 77.—That if any district shall deem itself aggrieved by any appraisement, assessment or damages or award by said commissioners made to any owner of (or) claimant of land sought to be appropriated, it may appeal therefrom in the same manner as appeals are granted from the judgment of a justice of the peace, and in case of such appeal shall not be required to make any deposit of money with the county treasurer or have any right to occupy the land condemned pending such appeal, but upon final judgment on such appeal said district may pay the amount awarded the land owner into court and thereupon shall have the right to occupy the land for which the award is made (*Id.*, Sec. 45).

SECTION 3045. *What Determined.* Sec. 78.—That upon the trial of any appeal it shall be competent for the district to dispute and contest the title of the appellant to the land appropriated, and to show that the land so appropriated constituted an obstruction or encroachment

wrongfully placed in the channel or between the banks of such watercourse or that for any other reason the appellant is not entitled to any compensation therefor, and if it shall be found that the land so appropriated constituted an obstruction wrongfully placed in said watercourse or that for any reason the appellant is not entitled to receive any compensation or damages therefor, no compensation or damages shall be awarded, and any deposit made by the drainage district shall be forthwith refunded to it (*Id.*, Sec. 46).

SECTION 3046. *Pay of Commissioners.* Sec. 79.—That each commissioner appointed under this act shall receive for his services the sum of three dollars per day for the time actually engaged in the performance of his duties, to be paid by the district (*Id.*, Sec. 47)."

* * * * * * *

"SECTION 3015. *Engineer; Plans.* Sec. 48.—That the board of directors may appoint or employ one or more engineers and prescribe their duties, and may cause all such surveys, plats, estimates, specifications and reports to be made as may be required to determine whether the construction of any levee is necessary to prevent the overflow of any natural watercourse or other work or improvement should be done within the district, or to determine and fix the height and location of any pier, bridge or other structure permitted to be placed in or across such watercourse, or to direct and supervise any work or improvement ordered to be made (*Id.*, Sec. 16)."

* * * * * * *

"SECTION 3017. *Determine Work to Be Done.* Sec. 50.—That the board of directors, subject to the limitations contained in the next preceding section, shall have power and it shall be its duty to determine what work is necessary to be done, levees constructed or other improvements made to protect its district from overflow or damage and injury resulting therefrom, and whether the cost thereof shall be defrayed by issuing bonds to be

paid by the levy of general taxes or by the levy of special taxes or assessments; but before any bonds shall be issued, special taxes levied or liability of any kind incurred by it, the board of directors shall cause accurate surveys of all work deemed necessary by it to be done, and accurate estimates and calculations to be made by some competent engineer, who shall make a written report thereof, showing the amount, character and kind of work to be done and the location and probable cost thereof, and return and file the same, with all plans and specifications, in the office of its secretary, which report shall at all times be open to public inspection (*Id.*, Sec. 18).

SECTION 3018. *Engineer's Report.* Sec. 51.—That upon the filing of the engineer's report provided for in the next preceding section, the board of directors shall carefully examine and consider the same, and if they shall approve the same and determine that the proposed work or any part thereof ought to be done, and the cost defrayed by issuing bonds to be paid by general taxation, and the estimated cost thereof does not exceed the amount for which such bonds may be issued, then the board of directors shall proceed forthwith to call a special election as hereinafter provided to vote upon the question of issuing such bonds, and if such issue of bonds be authorized by the electors, then the board of directors shall cause such work to be done and issue bonds to pay the cost thereof (*Id.*, Sec. 19)."

APPENDIX 2.

AN ACT

RELATING TO NAVIGABLE STREAMS, AND TO PROVIDE FOR THE APPROPRIATION AND HOLDING OF LANDS NECESSARY FOR THE IMPROVEMENT THEREOF TO PREVENT OVERFLOW.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF KANSAS:

SECTION 1.—When harbor lines have been established by federal authority along navigable streams running through drainage districts now or hereafter organized under Chapter 215, Laws of 1905, and acts amendatory or supplemental thereto, the appropriation of lands for making the improvements provided for in said Act is hereby declared to be necessary for the protection of the health, life and property of the people of the district.

SECTION 2.—The lands so necessary to be appropriated shall consist of all land lying between such harbor lines, together with a strip forty feet wide on the land side of and contiguous to such harbor lines.

SECTION 3.—That whenever private parties or corporations claim to own any part of the land so to be appropriated in any such drainage district, having taxable property to the amount of not less than forty million dollars as shown by the assessment roll of the preceding year, and which shall have deposited with the treasurer of the county wherein such land is situated money to compensate for the appropriation of land necessary for the making of such improvements, the governor, when satisfied that the money so deposited is amply

sufficient to make full and adequate compensation for such property so to be appropriated, shall thereupon issue a proclamation declaring that the State of Kansas has taken and appropriated such land, describing the same, and proclaiming that from and after the date of publication of such proclamation said property and the right to possession thereof vests in the State of Kansas. Such proclamation shall be published in the official paper of the county wherein the land so appropriated is situated, and shall be notice to all parties interested that the State of Kansas has taken and appropriated the land therein described; and thereupon the governor shall take and hold possession of said land in the name and on behalf of the state; provided, however, the governor may appoint and designate the board of directors of the drainage district in which such lands are situated as agents of the state to take and hold such possession for and on behalf of and in the name of the state, and the possession of such land by the governor or such agents shall be possession by the state; and the sheriff of the county wherein such land is situated shall, upon the request of the governor or such agent, put them in possession of such property.

SECTION 4.—That from and after the issuing and publishing of such proclamation, any person interfering with the possession of such property by the state or its agent shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment not less than thirty or more than ninety days, or by both such fine and imprisonment; and the sheriff of the county wherein such land is situated, upon request by the governor, shall remove all persons interfering with the possession of the state or its agent from said land and protect the agent of the state in such possession.

SECTION 5.—That for the purpose of ascertaining whether or not any private person or corporation is the owner of any part of the land so taken, and, if such owner, to provide and secure full and adequate compensation for the appropriation thereof, the attorney-general, upon the publication of such proclamation by the governor, is hereby directed to commence an action in the District Court of the county wherein such land is situated, such suit to be entitled The State of Kansas vs. all persons having or claiming any interest in the land lying between the established harbor line of the..... river and within a distance of forty feet landward therefrom, within the.....drainage district, in.....county. Notice shall be given by publication of the filing of said action, setting forth the nature of said suit and that all such claimants must appear and set forth their claim on or before the date therein named, which shall not be less than forty-one days from the date of the first publication, and that upon their failure so to do a judgment will be rendered therein excluding them from any interest in said land or any part thereof, and enjoining and barring them from asserting any claim to said land or any part thereof adverse to the State of Kansas. Such publication shall be made in the manner provided for publication notices in the code of civil procedure. If the claimants so notified shall appear in said cause, then said action, as to the parties so appearing, shall proceed to trial as in other civil actions, before a jury, unless such jury be waived, to determine the ownership of said property and to assess the value of the land and other damages for the taking of such portion thereof as may belong to parties other than the public. That in the event the claimants shall fail to appear on or before the date named, a *pro confesso* judgment shall be entered excluding them from any interest in said land, which said judgment shall become final and conclusive at the expiration of six months from the date of such rendition unless the claimant shall make application within such period for the va-

cation of such judgment and permission to defend in said action, and shall show to the court that he had no knowledge or notice of the pendency of said action prior to the rendition of such judgment.

SECTION 6.—That the drainage districts into or through which such navigable stream flows are hereby made liable for the value of any land so appropriated, together with all damages which may be occasioned thereby, to the owner of the land so appropriated, and the cost of said suit, and any judgment rendered in said action against the State of Kansas shall be a lien upon all the taxable property in such drainage district; and the board of directors of such drainage district is hereby empowered and directed to pay said judgment, the cost and award from the funds in their hands and under their control for such purpose, and in the event such funds are insufficient or for any reason may not be used for such purpose, the board of directors shall issue bonds or levy a tax for the payment thereof as provided by law; and in the event that the board of directors of such district shall fail or neglect to pay the full amount of the judgment, cost and award as herein provided, the board of county commissioners of the county wherein such land is situated is hereby empowered and directed to levy a tax upon all the taxable property within the limits of such drainage district and cause the same to be extended upon the tax rolls and collected as other taxes in a sum sufficient to pay such judgment, cost and award in full, and the same when so collected shall be so applied; and if for any reason there shall be a failure to satisfy such judgment, the rights of the state to such tract or tracts of land shall be divested and the possession of such tract or tracts of land shall revert to the former adjudicated owners, in which event compensation shall be awarded for any loss or damage occasioned by such temporary appropriation, and the court shall render judgment therefor, which judgment shall be enforceable as in case of permanent appropriation; provided, however, that in any

such action it shall be competent for the state to dispute and contest the title of the claimant and to show that the land so appropriated constituted an obstruction or encroachment wrongfully placed in the channel or between the banks of said stream, or that for any other reason the claimant is not entitled to any compensation therefor, and if it shall be found that the land so appropriated constituted an obstruction wrongfully placed in said stream, or that for any reason the claimant is not entitled to compensation or damage therefor, judgment shall be rendered accordingly.

SECTION 7.—That any railroad or railway company having a right of way crossing any of the land so appropriated shall not be deprived of an easement for the use of such right of way, but shall be permitted to retain the right it now has for the purpose of crossing or running along upon or over such levee; provided, however, that such use and occupancy shall not interfere with the widening of such stream and shall not become an obstruction to the flow of the water therein and shall not interfere with the height or otherwise impair the usefulness of the levees to be constructed for the purpose of preventing overflow.

SECTION 8.—That any person having personal property in or upon any land so appropriated shall remove the same within a reasonable time, to be fixed by the agents of the state, and should they fail or neglect so to do such agent may remove the same, or the attorney-general may institute a mandamus suit or suits in any court of competent jurisdiction to compel such removal.

SECTION 9.—This Act shall not be construed as a repeal of Chapter 215 of the Laws of 1905 or any statute relating to the matters herein provided for, but as supplemental thereto.

SECTION 10.—The board of directors of such drainage district is hereby empowered to grant easements in or to such forty-foot strip for such use and occupancy as will not interfere with the right of the state to the use of the same for the prevention of overflow, and if at any point along such harbor line the full width of forty feet is not required for the construction of levees or other improvements to prevent overflow, the board of directors of such drainage district may relinquish such part as shall be deemed unnecessary.

SECTION 11.—That the remedies provided by other acts relating to the same subject matter shall be held to be concurrent herewith.

SECTION 12.—This Act shall take effect and be in force from and after its passage and publication in the official state paper.

No. 19 Orig.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 19 (Original.)

IN THE MATTER

OF

THE APPLICATION OF METROPOLITAN WATER COMPANY OF WEST VIRGINIA FOR A WRIT OF MANDAMUS DIRECTED TO THE HONORABLE SMITH McPHERSON, ACTING DISTRICT JUDGE OF THE UNITED STATES FOR THE DISTRICT OF KANSAS, AND DIRECTED TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

Now comes the Kaw Valley Drainage District of Wyandotte County and moves the court that it be made a party respondent in the above proceeding and for leave to file answer to the order of this Honorable Court under date of April 10, 1911, directed to the Honorable Smith McPherson, Acting District Judge of the United States for the District of Kansas and to the Circuit Court of the United States, directing them to show cause why a writ of mandamus should not issue.

LEWIS W. KEPLINGER,
Attorney for Kaw Valley Drainage District.

CHARLES W. TRICKETT,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 19, Original.

EX PARTE: IN THE MATTER OF THE METROPOLITAN WATER COMPANY OF WEST VIRGINIA, PETITIONER.

RETURN TO RULE TO SHOW CAUSE.

FILED APRIL 19, 1911.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 19, Original.

IN THE MATTER OF METROPOLITAN WATER COMPANY OF WEST VIRGINIA, PETITIONER.

RETURN.

Now comes Smith McPherson, United States District Judge in and for the Southern District of Iowa, and makes the following return or answer, pursuant to the order of this Honorable Court under date of April 10, 1911, and makes the following showing:

Pursuant to an order of one of the Circuit Judges of the Eighth Circuit, I was assigned to assist the Honorable John C. Pollock, District Judge for the District of Kansas. The petitioner herein, with five others as complainants, each filed a separate bill of complaint praying for a restrain-

ing order, all in substantially like form, except as to the property involved, and as shown by Exhibit B, page 12, in the printed motion for leave to file petition for writ of mandamus and for the rule. And as shown by petitioner herein, a restraining order was issued as prayed and the cases set down for hearing and arguments were heard.

The question argued was whether the cases as made were within section 17 of the Act of Congress approved June 18, 1910, counsel for complainants (one of which is petitioner herein) denying the proposition, and counsel for the defendants affirming it. Whereupon I filed a written opinion in the cases.

Thereupon, the cases were argued as to the questions as to whether the restraining orders should be vacated, and whether interlocutory injunctions should be granted. Those questions were taken under advisement, with leave to counsel to file briefs. Then, for the first time, counsel for complainants (including petitioner herein) contended that I should call to my assistance two other judges, under section 17 of the Act of Congress as aforesaid.

As to both questions my written opinions filed in the cases, are now and here referred to, and made a part hereof, as fully as though herein set out in full, the same being found in the printed record filed by petitioner, being Exhibit "D", at pages 28 to 46, inclusive.

The restraining orders theretofore issued were

vacated, and the temporary or interlocutory writs of injunction denied, for the reasons stated in said two opinions.

Having fully answered the rule to show cause why a writ of mandamus should not issue herein, it is now most respectfully stated that the said Circuit Court of the United States for the District of Kansas, and myself as acting Judge thereof in said cases, will cheerfully comply with any and all rulings and orders made by this Honorable Court in the premises.

Done at Kansas City, Kansas, April 17, 1911.

SMITH McPHERSON,
District Judge for the Southern District of Iowa and Acting as Circuit Judge for the District of Kansas in Said Cases.

UNITED STATES OF AMERICA,
Western District of Missouri, ss:

I, Smith McPherson, being first duly sworn, do depose and say that I have read the foregoing return and answer to show cause, and that the recitals and allegations therein contained are each and all true, as I verily believe; so help me God.

SMITH McPHERSON.

Subscribed in my presence and sworn to before me by him, the said Smith McPherson, this April 17th, A. D. 1911.

Witness my hand as the Clerk of the Circuit Court of the United States, Western District of Missouri, and the Seal of said Court attached.

[Seal of the United States Circuit Court for the Western District of Missouri, Western Division.]

ADELAIDE UTTER, *Clerk.*

[Endorsed:] Supreme Court U. S. October Term, 1910. Term No. 19, Original. *Ex parte:* In the Matter of The Metropolitan Water Company of West Virginia, Petitioner. Return to rule to show cause. Filed April 19, 1911.

IN THE

Supreme Court of the United States

No. 19.

OCTOBER TERM, 1910.

IN THE MATTER

OF

THE APPLICATION OF METROPOLITAN WATER COMPANY OF WEST VIRGINIA FOR A WRIT OF MANDAMUS DIRECTED TO THE HONORABLE SMITH MCPHERSON, ACTING DISTRICT JUDGE OF THE UNITED STATES FOR THE DISTRICT OF KANSAS, AND DIRECTED TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

REPLY BRIEF ON BEHALF OF THE RESPONDENT

SYNOPSIS OF CLAIM.

To safeguard State laws against inconsiderate overthrow was the central purpose of Section 17 of the Act of June 18, 1910. This central purpose constitutes the regal factor in the construction of every part of the section, and inferences inconsistent therewith based upon the letter of particular provisions should not be permitted.

That the provision requiring notice to the Governor, and the provision requiring the calling in of additional judges stand upon precisely the same footing. The presence of each was because of one and the same central purpose; that though a State law cannot be overthrown, it may be upheld without notice to the Governor.

That though a State law cannot be overthrown, it may be upheld without calling in additional judges.

That the insertion of the words "after notice and hearing" strongly indicates that there might be cases which could be disposed of without the notice, and without the hearing provided for in the section.

That the spirit though not the letter of the law does permit appeal whether the injunction be awarded or refused.

That a single judge does have the right to uphold the law and deny the injunction in cases where the claim of invalidity is not worthy of serious consideration, subject possibly, however, to liability to be compelled by mandamus to act otherwise, should this court be of opinion a serious question was in fact presented.

All these claims are made with varying degrees of confidence.

But our chief reliance is upon the proposition that even though, conceding each of the foregoing claims to be unfounded, and conceding that the relator had a clear legal right to have the judge call in other judges, it still remains for this Court, in the exercise of discretionary power which it possesses, to determine whether or not he shall be compelled to do so.

And we further claim that in this particular case the conditions are such as imperatively demand the refusal of the writ.

1.

THE ANSWER OF THE KAW VALLEY DRAINAGE DISTRICT.

Both upon the oral argument and in their brief, counsel for the petitioner make statements which are in conflict with the facts as stated in the Answer of the District. If the truth of the matters stated in the Answer of the District constitute a reason why no writ should issue, the logic of the situation demands that those statements be accepted exactly as there stated. The petitioner must deny the materiality of those statements or admit their truth. If they are material the petitioner should have taken formal issue, and such issue of fact should have been determined by evidence. We were and are prepared to prove to the letter every statement in that Answer.

That the District is the real respondent and might properly have been permitted to be a party.

164 Fed., 688.

If that answer be a defense the District was grievously prejudiced by the refusal to permit it to be filed and proven.

2.

THE ACTION OF THE TRIAL COURT PROPER.

Though recognizing the seeming uselessness of arguing against a foregone conclusion, the gravity of the situation compels the submission of some further considerations.

Suppose mandamus issues as prayed for and additional judges are called in who also hold the law constitutional and deny the injunction. Suppose also the petitioner appeals to this Court and the decision of the Court below is affirmed, all of which to say the least is quite possible.

Then again suppose some other land owner should copy the bill of complaint filed by the petitioner and apply for a

temporary injunction on precisely the same grounds, must the court again delay the work and call in other judges? Unless men are made for law instead of laws for men, the court ought under such circumstances to have the power to deny the application and proceed alone to deny the injunction. But if after the law had been once sustained by this court the court would still be required to call other judges, he could be required to do so without limit. Surely *some* latitude must be allowed a court to whom such application is made.

The court should be permitted to consider whether there were reasonable grounds for the claim made.

We submit that especially should this test be applied in a case like this, where the result to the general public may be so disastrous. We confidently assert that the claim of invalidity in this case *is* manifestly and clearly unfounded, and that for that reason the court might properly deny the injunction without calling in additional judges.

In answer to this claim, on the oral argument, our attention was directed to the first sentence on page 44 of the petitioner's pamphlet, where Judge McPherson proceeds to consider the only question in the case which he says gave him any great concern. With this out of the way the objection based upon the due process of law clause would certainly have been frivolous.

But we now direct the attention of this court to the fact that the only question which gave the learned judge serious concern *was not in the case at all.* The petitioner, in his Bill of Complaint, never suggested that the taking of the land was unnecessary, or that the provisions made for that purpose would not, with absolute certainty, result in giving him his pay. Neither did it intimate any fear lest that the money on hand for that purpose would be diverted. Nor did it deny the proposition well settled by repeated decisions

of this court, Williams vs. Parker, 188 U. S., 491, that the land could be first appropriated and the damages ascertained and payment made thereafter. Nor did it complain that the trial before a jury as in ordinary cases was not all that could be desired. It was not upon any of these grounds that it claimed the law was in violation of the due process of law clause of the 14th amendment. The only claim was that after the State had taken possession under a law which in all other respects was free from conflict with that clause, it was brought in conflict therewith by Section 4 of the act which provides penalties for those who interfere with the State's possessions. In other words, a law otherwise valid is rendered invalid by reason of the fact that penalties are provided for its infringement. And this we call frivolous.

That this statement of the situation so far as the objection to the validity of the act is based upon its supposed conflict with the due process of law clause in the 14th amendment will clearly appear by reference to petitioner's Bill of Complaint, page 25.

> "Said act (Exhibit 1) violates Section 1 of the Fourteenth Amendment of the Constitution of the United States, in that it takes the property of complainant, and the other owners aforesaid, without due process of law, for that Section 4 of said act prescribes penalties against the owners of the land embraced in the terms of the act for refusing to permit the drainage district to take possession of their lands, that are so drastic as that no owner of any of said lands can invoke the jurisdiction of any court to test the validity of said act except at the risk of confiscation of his property and imprisonment for long terms."

The fact that the Judge found any matter which gave him any concern as suggested on page 44 was because the numerous counsel who denied the validity of the law suc-

ceeded in withdrawing his attention from the objection actually made in complainant's bill.

We now assert that the Court in fact evidently did regard the objection that was actually made unworthy of one moment's consideration. The evidence of this assertion is found in the fact that in his opinion he does not so much as mention the possible effect of the only provision which the petitioner in his complaint relies on as bringing the case within the due process of law clause of the 14th amendment.

The objections based upon the "equal protection of the law" clause of the 14th amendment are not less unworthy of serious consideration. *These* objections gave the Court no great concern.

These objections have reference to the conditions which the act makes the basis of discrimination between lands which do, and those which do not, come within the act. Whether such discrimination be such as to render the resulting classification invalid depends upon most simple principles which are easy of application and which have been laid down by this Court.

"The rule is well established that the classification will be upheld if germane to the object and purposes of the act. All that is necessary is that the classification shall 'rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed.' "

165 U. S., 155.

"To render the classification invalid it 'must be arbitrary and unreasonable, not merely possible, but clearly and actually.' "

Brachtel vs. Wilson, 204 U. S., 41; 199 U. S., 411.

"Courts will not enjoin a State law unless void beyond a reasonable doubt.

Ex parte Young, 209 U. S., 123.

"And, finally, unless the basis of classification be 'palpably arbitrary' the law will be upheld."

171 U. S., 562.

3.

THE BASIS OF THE CLASSIFICATION.

The necessity for protection against apprehended floods with the least delay possible is most obvious. The Legislature recognized this necessity and it constitutes the basis of the classification now objected to. Lands which could be appropriated without the preliminary proceedings necessary in case of other lands were placed in a class by themselves.

There are different obstacles which may stand in the way of the immediate appropriation of lands necessary for protection against flood. In some cases time must be consumed in making necessary surveys, and calculations as to width and location of channel and other like matters. But in case of navigable streams, where harbor lines have been established by Federal authority, there is no occasion for delay on such grounds. With these lines established the Legislature knew that any dikes to be constructed would have to be outside these harbor lines. It knew that all land within such lines and sufficient outside those lines for dikes would have to be taken. Therefore no delay was necessary as to such lands. Their location on the banks of navigable streams and within harbor lines established by Federal authority was one of the conditions upon which their admission to the selected class was made to depend.

The claim that to make the location of the land within established harbor lines the basis of classification, was "palpably arbitrary" is a claim which is itself "palpably frivolous."

Again the provision of the Federal Constitution which forbids appropriation of land to be taken without just compensation, constitutes a serious obstacle in the way of speedy appropriation. Although this Court and the Supreme Court of Kansas hold otherwise, many States hold that under such constitutional provisions the compensation must have been ascertained and actually paid before possession can be taken. The States which hold to the contrary, however, do require that if compensation be not paid in advance, provision must be made therefor, which will render it little short of absolutely certain that the compensation will be paid. The nearer the provision made comes to rendering it absolutely certain that the compensation will be paid, the farther it is from the danger line. A recognition of this fact constitutes the basis for every discrimination which the petitioner claims to have been arbitrary. The manifest purpose of the act was to provide that immediate possession might be taken only in that class of cases where it was all but absolutely certain the compensation would be paid. In short the object was to keep out of the way of the Constitutional Amendment which seemingly requires actual payment of compensation in advance, and every condition necessary to bring a case within the act was selected with direct and manifest reference and is germane to such purpose. Consider these conditions one by one. Where the district has already voted and sold bonds and has money on hand with which to pay the compensation, to make this fact a condition for admission into the class was not "palpably arbitrary." The same is true as to the requirement that the Governor shall be of the opinion that the money on hand is sufficient.

Objection is specially made to the provision which restricts the operation of the law to land in Districts which have taxable property of the value of not less than forty million dollars. It is claimed that this restriction is purely arbitrary. But not so. Those who question the validity of the law might claim, just as the petitioner in this case, as shown by the opinion of the Court on pages 44 and 45 did claim, in its argument though no suggestion of the kind appears in its bill, that the District might refuse to apply the money on hand for that purpose to the payment of the compensation when ascertained. The money might be stolen. The law under which the District was organized might eventually itself be held to be void. All these objections were liable to be urged to show that the law did not ensure actual payment of the compensation guaranteed by the 14th amendment. To obviate these objections and to render it all but absolutely certain that the land owner would receive his compensation, the law provided a means of payment which would be wholly independent of the existence of the District, or of the will of its officials. Whether the District be legally organized or nôt, the law makes all property within the District chargeable with the payment of the compensation, and such payment may be enforced through officials other than those of the District.

The extent to which such provisions would afford security would depend upon the value of the property within the District. Forty millions of assessed valuation would be more certain security than would thirty, or twenty or ten millions just as the age of twenty-one is fixed upon the line which divides between those who are, and those who are not, entitled to vote.

We submit that principles upon which the validity of the act in question depend have been so clearly determined by this Court adversely to claims of petitioner that action of the trial Judge was right.

We call special attention to the words *"after notice and hearing,"* found in the last sentence of Section 17.

> "The rule is that a statute ought to be so construed that *if possible* (italics ours) no clause, sentence or word shall be superfluous, void or insignificant."
> Montclair Township vs. Ransdell, 107 U. S., 147.

The insertion of the words "after notice and hearing" strongly suggests that there might be cases which could be disposed of without a hearing before additional judges and without notice. Upon this theory it *is possible* to account for the presence of those words, without them it is not.

It may well be that the lawmakers took into consideration the fact that cases might be presented where, by reason of the objections raised having already been determined by this Court, or for other like reasons the calling in of other judges, as well as the giving of the notice might be wholly unnecesary, as in cases arising under the Removal Act.

137 Fed., 193.
106 Fed., 608.
30 S. C. R., 27.

Unless there might be cases where the question as to the validity of State laws could be disposed of without notice or hearing, the words "after notice and hearing" serve no purpose whatever.

The State Constitution.

It was also claimed in the bill asking the injunction that the act was in conflict with the State Constitution. Petitioner's pamphlet 24.

Whether the word "unconstitutional" in Section 17 of the Act of June 20, 1911, has reference to the State Consti-

tution may well be doubted. Be this as it may, however, if the classification of lands made by the act is free from objection under the equal protection clause of the 14th amendment, it meets the requirements of the State Constitution also.

And further, when analyzed, the allegations of the bill utterly fail to raise any question as to the validity of the act under the State Constitution. The allegation of the bill is that this is a special law. But an inspection of the act itself shows it to be general. It applies to every acre of land within the State that does, or that hereafter may, come within the provisions of the act.

The Constitution does not forbid general laws, even though a special law might be proper. The bill avers that a general law could be made applicable to all Drainage Districts covering all the matters and things contained in the act. This act deals not with Districts, but with lands. It provides that lands of a particular class may be appropriated in advance of the ascertainment and payment of damages. We concede not only that a general law could have been made applicable to all lands as to which the conditions were as stated in the act, but we call attention to the fact that this very thing has been done and in this very law.

As shown by the decisions of this Court above cited, the selection of the conditions which constitute the basis of the classification of the act in question was not palpably arbitrary. On the contrary, the claim that it was is palpably incorrect.

4.

THAT THE TRIAL COURT SHOULD HAVE CALLED IN OTHER JUDGES NOT CONCLUSIVE AS TO THE DUTY OF THIS COURT TO REQUIRE HIM TO DO SO.

Whether the trial court should have called in additional judges, and whether this Court shall now compel him to do so, are questions which depend upon entirely different legal principles.

Conceding for the sake of the argument what we do not concede in fact, that the petitioner had a clear legal right to demand that additional judges should have been called in, and that by reason of the failure to do so the petitioner is deprived of an appeal, we still insist that under well-established precedents this Court is under no obligation to issue the writ.

Whether a writ of mandamus shall go or not is a question which rests in the discretion of the Court.

23 S. C. R., 624.

"Even where a clear legal right is shown, the exercise of jurisdiction to grant this extraordinary remedy rests to a considerable extent within the sound discretion of the court, subject, however, to the well-settled principles which have been established by the Court or fixed by statutes *and evidence will usually be received upon request of the respondent to show that the writ should not issue.*" (Italics ours.)

Spelling, Vol. 2, Sec. 1371.

"The naked right to the writ is not sufficient. It may be withheld where the public interest would be injuriously affected and if there is a doubt of its property it will not issue."

26 C. Y. C., 146.

"This Court has repeatedly held that this discretionary writ will not be awarded in all cases where a *prima facie* right to the relief is shown, but regard will be had to the exigency which calls for the exercise of such discretion, the nature and extent of the wrong or injury which would follow a refusal of the writ and other facts which have a bearing upon the particular case."

114 N. W., 82. (Mich.)

"Granting, *arguendo*, that the assessors should have acted upon the application to them, at least to the extent of dismissing it, or otherwise refusing it, and should have given the statutory notice of their decision, it does not follow that the writ of mandamus should now issue to compel them to do so. The writ is not an ordinary writ to be sued out as a matter of course. It is an extraordinary writ to be issued only when it is made to appear to the Court that the writ is necessary to secure some substantial right and that it will be effective to secure that right."

66 At., 310.

The same rule is applied and the same doctrine adhered to in 63 At., 620.

Also, 215 Ills., 488; 211 Ills., 252.

In a case where the law required the County Superintendent to contract for text books selected by a committee of teachers, he refused to do so. Mandamus was applied for.

"Held that notwithstanding their clear legal right and the unlawful conduct of the Superintendent, the writ was properly refused because the books of other publishers had already been introduced into the schools and a change would have seriously affected public interests."

Exeter vs. Hamilton, 10 S. O., 39.

See also 54 N. Y. S., 308, affirmed in 53 N. E., 1133.

"Mandamus will be refused where public interests would be injuriously affected and it will not be issued to compel performance of an act which will work a public and private mischief."
26 C. Y. C., 146.

"Mandamus will not, as a general rule, issue where rights of third parties will be injuriously affected."
26 C. Y. C., 149.

In this case contractors who are now actively at work will suffer heavy loss by the stopping of the work.

"The relator's hands must be clean. He must not have contributed to the conditions of which he complains."
26 C. Y. C., 151.

"Where a court finds that the conduct of the party has been such that it would be inequitable to grant a peremptory writ of mandamus on his application it is proper to deny the writ."
34 At., 1030.

In this case the petitioner's hands are not clean and it has been guilty of inequitable conduct which did contribute to the condition of which it complains.

In its brief it is represented as having through the argument insisted upon the calling in of additional judges. In the pleadings rather than in brief is the place to state disputed facts. To say nothing of the verified answer of the Drainage District the return of the judge shows this statement to be glaringly incorrect.

The return of the judge says:

"Whereupon I filed a written opinion in the cases. Thereupon the cases were argued." This would indicate that the cases were immediately argued as to constitutionality of

the law. This particular "thereupon" meant precisely one week later, as stated in the verified answer of the District. "Thereupon the cases were argued as to whether the restraining orders should be vacated and whether interlocutory injunctions should be issued. Those questions were taken under advisement, with leave to file briefs. *Then for the first time* (italics ours) counsel for complainant (including petitioner herein) contended that I should call to my assistance two other judges, under Section 17 of the Act of Congress aforesaid."

In its brief on page 12, the statement is made "that petitioner's attorney asserted petitioner's right to a hearing of its application before a tribunal clothed with the right to grant it and urged Judge McPherson to call in other judges, as provided by the Act of Congress. The entire argument on behalf of petitioner was directed to that end." We heard every word of the oral part of that argument, and we have searched in vain through every copy of the petitioner's brief, to which we had access, but we failed to discover any evidence of the fact that the end thus stated in its brief in this proceeding was the end in view, or that such action was desired or thought of. Also, the judge's return shows that no intimation was given to him until after the end of the oral argument, which lasted three days, when the request was made to him in a brief (that portion of which brief we never saw), which was presented to the judge while the case was under advisement.

Had we been apprised of the fact on the 20th of April, when the case was set down for hearing one week later for hearing before a single judge, that the petitioner intended to insist upon the calling in of other judges, or if in the three days oral argument, or at any time prior to the decision was made that such demand would be made, our atten-

tion would have been sharply directed to the clauses in Section 17 upon which counsel for petitioner now relies as the basis of its claim for the writ. And although we do not concede that the Court's action was wrong, we would instantly have recognized the folly of taking chances where matters of such moment were involved. We should most assuredly ourselves have pointed out the bearing of the clauses relied upon by the petitioner and the probable disastrous consequences of error in proceeding before a single judge, and we would most earnestly have seconded the request of the petitioner for additional judges.

It is scarcely possible that if the attention of the judge had been called to the fact that his decision would result in this proceding with the result which in view of the indications at the time of the oral argument now seems imminent, and the disastrous consequences to the public which now seem probable, that he would not have conceded to such joint request for additional judges.

The petitioner's hands are not clean. Its inequitable conduct has contributed to the result of which it now complains and under the authorities above cited the Court may properly refuse the writ.

4.

Considerations Which Should Influence the Court in the Exercise of Its Discretion.

We recognize the fact that the discretion which the Court may exercise is subject to settled principles established by precedent. Nevertheless the authorities cited establish the fact that to some extent it *does* have discretionary power.

To exercise this discretion intelligently requires that the Court shall look to all the surrounding conditions and circumstances of the particular case. So far as shown by the face of the papers, two cases might be precisely the same

and yet the writ might be allowed in one and refused in the other. We now call attention to matters which we submit should make this a case for the denial of the writ.

The petitioner has been guilty of inequitable conduct which has contributed to the condition the writ is sought to remedy. The maxim "He who will not speak when he should, shall not when he would" applies here.

Again, to issue the writ would necessarily occasion heavy losses to contractors and other third parties.

Also, there is very great danger that the issue of the writ would result most disastrously to the general public by preventing the completion of the dikes now in active process of construction before the June rise of the river.

Again, we submit that even though the utter improbability that the law would be held invalid would be no reason why the judge should have omitted to call in other judges, this Court may properly and should consider such improbability in a matter where discretion is to be exercised.

If additional judges should be called in and they should uphold the law, it will not make the slightest difference how clearly right such decision may be, the case will undoubtedly be appealed by the petitioner to this Court, just as it sought by *certiorari* to bring up the decision of the Court of Appeals vacating its prior injunction. The policy of the petitioner is to stand in the way until popular claims for flood protection compel the District to pay higher damages, by way of compromise, than a jury would award.

Since the precise question must finally be decided by this Court, it is exceedingly unfortunate if the settled rules of law will not permit this Court to now consider and determine whether the law is or is not constitutional and end this most disastrous controversy.

Could this Court consent to do so, nothing would please us more than to stipulate with the petitioner that this should be done. Will petitioner join in the request we now make

that this Court shall now determine as to the validity of the law, as on appeal, instead of doing so on the formal appeal which would otherwise certainly come later? Should it refuse, we submit, such refusal would itself be a circumstance which might properly influence the exercise of the discretionary power of the Court.

But the most weighty consideration which should influence the Court in the exercise of its discretion, is found in the fact that to refuse the writ will not harm the petitioner in the least. The State is entitled to this land. The petitioner is entitled to full compensation for whatever damages it may sustain and that it will receive, whether the writ issues or not. It is insisting upon a bare technical legal right to a particular remedy. The ultimate relief will be identically the same whether the writ does or does not issue.

To state the plain fact in its most brutal form, the petitioner is seeking to use this Court, acting as it must under duress of supposedly established rules and precedents, as the instrument to place the District in a condition where, in obedience to a popular demand for immediate flood protection, it may be compelled to pay the petitioner an exorbitant compensation.

We know no better way to illustrate what may be expected to happen than to state what did happen in a similar case when the city was compelled to appropriate the water plant owned and operated by this same water company.

If we have not here the conditions which might properly influence the Court in the exercise of its discretion, it would be difficult to imagine conditions which should have that effect.

Since its organization the District has been peculiarly unfortunate. For six long years, through court errors, in one instance procured by the relator, and not because of any mistake or misstep of its own or of its

representatives, its hands have been tied, and it is still unprotected. Again and again within that period its people have been driven from their homes by actual flood or by well-grounded fear of flood. Not until January of the present year did the way become apparently clear. Condemnation proceedings were commenced, contracts were let, the men, teams and machinery were on the ground, and work would have begun within less than one week upon the unfinished portion of the line, when the petitioner instituted the injunction proceedings mentioned in its Bill of Complaint, found on page 17 of printed pamphlet. Not knowing how long it would take to get that injunction out of the way—for it had taken more than two years to get rid of a prior injunction—it is true as charged in the bill and upon oral argument, we did lay the whole matter before the Legislature and procure the adoption of the law now sought to be held unconstitutional. True it is, also, as stated by counsel, we did appeal from that injunction and it was vacated by the Court of Appeals. And it is further true, though not so stated by counsel, the petitioner sought unsuccessfully within the last few weeks by *certiorari* to have that decision reversed by this Court.

5.

Section 17 of the Act of June, 1911.

Although we chiefly rely upon considerations wholly independent of our construction of that section, we next consider Section 17 of the Act of June 18, 1911.

It is claimed that to deny mandamus would put it in the power of a single judge to foreclose the situation by refusing to call in other judges and then denying the injunction. This contention is upon the theory that no appeal would lie, because if we are confined to the letter of the act appeals are allowed only "after notice and hearing" and that where there has been no hearing before additional judges *after*

hearing and notice there can be no appeal. But is this correct?

Suppose after a hearing before the additional judges, but without the required notice, the law were upheld and the injunction denied. If the letter of the law is to govern there could be no appeal because the letter of the law permits appeal only in cases where there has been both such hearing and such notice. But could the petitioner in such case omit appeal and maintain mandamus to compel another hearing after notice? Or if it did appeal would the District be heard to claim that the appeal should be dismissed. We think not. The purposes for which notice was required having been accomplished and the law upheld without the notice, the omission to give notice would be wholly immaterial and the appeal would lie.

But the requirement that additional judges shall be called stands upon precisely the same footing. The Court judicially knows—what the whole country knows—that reasons which caused the adoption of Section 17 were precisely as stated by Judge McPherson in his opinion. There was a general complaint because of the frequency with which the execution of State laws was interfered with by Federal judges. If the law were upheld, the reason for the requirement that additional judges should be called in rendered the omission to do so no less immaterial than it did the omission to give notice. And for precisely the same reason that the omission to give notice would not prevent appeal in a case where the injunction was denied, the omission to call in other judges would not prevent appeal.

The whole situation may be thus stated:

The law nowhere forbids appeal in cases where additional judges were not called in and where notice was not given. The letter of the law provides for appeal only in cases where additional judges have been called and where notice has been given. But the manifest spirit and purpose of the law is—

that appeals are allowed in all cases whether the injunction is allowed or denied.

But we insist and we direct special attention to what we believe the reasonableness of the claim we now make, that the manifest intent of the act that appeals shall be allowed when the injunction is denied cannot be permitted to override the fact that the omission to give notice or call in additional judges is wholly immaterial in cases where the law is upheld, and most absurdly require notice to the Governor in a case where the result shows notice would have been utterly useless. Let the manifest spirit and manifest intent of the law govern throughout.

In cases where notice of the calling in of other judges, either or both was wholly immaterial, the spirit and intent of the law, though not its letter, did authorize appeal and the petitioner should have resorted to that remedy.

To have called in additional judges, while it would have discommoded them, would not, even though unrequired by law, have rendered their action invalid. That they were not called in was unfortunate. But laws are for man and not man for laws. The door through which other precedents have entered still stands, and forever must stand, wide open. We believe the cases cited by us show the relief we ask would not be in conflict with established precedent, but if no precedent can be found for a ruling which, while it would protect interests both public and private, which are of such magnitude, would work no actual injury to the company, then let one be made now.

And this, this Court, above all others, has the power to do.

All of which is respectfully submitted.

LEWIS W. KEPLINGER,
Attorney for Respondent and
Kaw Valley Drainage District.

CHARLES W. TRICKETT,
Of Counsel.

EX PARTE METROPOLITAN WATER COMPANY OF WEST VIRGINIA

No. 19, Original. Argued April 24, 1911.—Decided May 15, 1911.

The provisions of § 17 of the act of June 18, 1910, c. 309, 36 Stat. 557, in regard to interlocutory injunctions to restrain the enforcement of state statutes on the ground of unconstitutionality, relate to the hearing of the application, and a single judge has no jurisdiction to hear and deny such an application. He must, prior to the hearing, call to his assistance two other judges, as required by the act.

A single justice or judge who, without calling to his assistance two other judges as required by § 17 of the act of June 18, 1910, c. 309, 36 Stat. 557, denies an application for injunction in a case specified in said act, on the ground that the state statute involved is constitutional, acts without jurisdiction, and the order is void.

Where no appeal is given by statute, mandamus is the proper remedy, *Ex parte Harding*, 219 U. S. 363; and so held as to an order made by a single judge denying a motion for injunction in a case specified in § 17 of the act of June 18, 1910, c. 309, 36 Stat. 557, the statute only providing for appeals from orders made after hearing by three judges.

THE facts, which involve the construction of § 17 of the Act of June 18, 1910, c. 309, 36 Stat. 539, 557, in regard to the practice to be pursued in courts of the United States in a case where an interlocutory injunction is applied for to restrain the enforcement, operation or execution of a state statute by restraining the action of any officer of the State, are stated in the opinion.

Mr. Willard P. Hall, with whom *Mr. C. F. Hutchings* and *Mr. O. L. Miller* were on the brief, for petitioner.

Mr. Lewis W. Keplinger, with whom *Mr. Charles W. Trickett* was on the brief, for respondents and Kaw Valley Drainage District.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

This is a proceeding in mandamus, in which relief is sought against a district judge, acting in a certain cause as a circuit judge for the district of Kansas, and also against the Circuit Court of the United States for the district of Kansas. To a rule to show cause a return has been filed and the Kaw Valley Drainage District of Wyandotte County, Kansas, has also, by leave, answered the rule. The matter is now for decision upon a motion to make the rule absolute.

Summarily stated, the facts bearing upon the issue to be decided are as follows:

By § 17 of the act of June 18, 1910, ch. 309, 36 Stat. 539, 557, creating the Commerce Court and amending the act to regulate commerce, provision was made as to the practice to be pursued in courts of the United States in cases where an interlocutory injunction is applied for to restrain the enforcement, operation or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute.

While proceedings, originally instituted in a state court of Kansas to condemn lands of the Water Company and others for the purpose of widening the Kansas River, were pending on appeal in the Circuit Court of Appeals for the Eighth Circuit, the legislature of Kansas, on January 28, 1911, enacted a statute which, in effect, authorized a summary appropriation of the lands affected by the pending condemnation suits, and directed the bringing by the Attorney General of the State of an action, after such appropriation had been consummated, against the owners of the lands appropriated "to determine the ownership of the property and to assess the value thereof and other damages for the taking of such portions of it as may belong to parties other than the public." By § 6 it was provided,

among other things, that upon a failure to satisfy the judgment rendered "the rights of the State to such land shall be divested and the possession thereof shall revert to the former adjudicated owners, in which event compensation shall be awarded for any loss or damage occasioned by the temporary appropriation, and that the court shall render judgment therefor. . . ." A few days after the passage of this statute the petitioner, a West Virginia corporation, commenced a suit in the Circuit Court of the United States for the district of Kansas against the Kaw Valley Drainage District of Wyandotte County, Kansas, and the individuals composing the board of directors of said drainage district, all averred to be citizens and residents of the district where the suit was brought. The bill prayed relief by injunction, temporary and permanent, restraining the defendants from a threatened taking possession of the lands of the petitioner under the act of January 28, 1911, upon the ground that the statute was repugnant to the Constitution of the United States. Thereafter, on February 8, 1911, District Judge McPherson, acting as circuit judge, issued a restraining order in the cause. The attention of the judge was called by the defendants to the provisions of § 17 of the act of Congress heretofore referred to, and request was made that two other judges, one of whom should be a circuit judge or a justice of the Supreme Court, should be called to assist in the hearing and determination of an application which was pending for a temporary injunction. It was, however, ruled that the provisions of such section merely deprived a single judge of the power to grant a temporary injunction, and that a court might be held by one judge for the purpose of decreeing the assailed statute to be constitutional and refusing to enjoin its enforcement. The court then heard argument, Judge McPherson alone sitting, upon the constitutionality of the Kansas statute. At the close of the hearing, counsel for the Water Company made the objection theretofore

urged by opposing counsel that the matter could only be disposed of by a court consisting of three judges, constituted as provided in the statute. Judge McPherson adhered, however, to his former ruling, and on March 6, 1911, a decree was entered vacating the temporary restraining order and denying a temporary injunction. This application for a writ of mandamus was then made.

The right to relief is based upon the contention that by virtue of the act of Congress a single judge was without jurisdiction to hear and determine the application for a temporary injunction. The prayer is that an order or rule be issued commanding the annulment and setting aside of the order of March 6, 1911, vacating the restraining order and denying the application for an injunction, and directing that the application for a temporary injunction be heard anew before a court consisting of three judges, in conformity to the act of Congress.

The question for decision is whether, pursuant to the act of Congress referred to, the Circuit Court composed only of one judge had power to hear and determine the application for a temporary injunction in the cause pending in the Circuit Court of Kansas. The legislation to be considered is § 17 of the Act of June 18, 1910, ch. 309, 36 Stat. 539, 557, reading as follows:

"That no interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute shall be issued or granted by any justice of the Supreme Court, or by any Circuit Court of the United States, or by any judge thereof, or by any district judge acting as circuit judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a Circuit judge, or to a district judge acting as circuit judge, and shall be heard and determined by

three judges, of whom at least one shall be a justice of the Supreme Court of the United States or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court of the United States, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however,* That one of such three judges shall be a justice of the Supreme Court of the United States or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: *Provided,* That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court of the United States, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall only remain in force until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken directly to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case."

In the opinion delivered by the court below in passing upon the question of the proper construction of the foregoing section the nature of the suit brought by

the Water Company was thus concisely and accurately stated:

"That these proceedings are for the purpose by injunction of restraining the enforcement of the state statute, I have no doubt. It is alleged that such state statute is absolutely void as being in conflict with both the state and National constitutions. The prayers are in effect that the statute be decreed void. Neither have I any doubt that the action is to restrain the action of an officer of the State of Kansas, namely, the Governor. This is so because the state statute in question provides that when the Governor issues his proclamation, which he has done, he shall at once take possession of the property either in person, or he may designate the officers of the drainage board to take such possession for him and in his name, but such officers of the drainage board to act as agents of the Governor. Therefore, I am of the opinion that the congressional statute is directly involved. And the question remains, shall this court now halt these proceedings, or shall other judges be called in to take control of the cases."

The suit being of the nature just stated, we are of opinion that the provisions of the act of Congress which are relied upon applied to the case, and that as a result of their application it imperatively follows that the hearing and determination of the request for a temporary injunction should have been had before a court consisting of three judges constituted in the mode specified in the statute.

We say the hearing should have been had as just stated because it results from the text of the applicable section of the act that limitations are unequivocally imposed upon the power of the single justice or judge to act in the character of case to which the provision refers. They are, *a*, to receive an application for an interlocutory injunction in the character of case stated in the section; *b*, within the period specified in the section to grant a temporary restraining order "if of opinion that irreparable loss or damage would

result to the complainant unless a temporary restraining order is granted;" and, *c*, to "immediately call to his assistance to hear and determine the application (for an interlocutory injunction) two other judges." It is to the hearing thus provided for that the notice must relate which is to be given to the Governor and to the Attorney General of the State and "such other persons as may be defendants in the suit." It is the hearing before the court thus constituted, also that is required to be expedited; and the appeal authorized by the section to be taken directly to this court "from the order granting or denying, after notice and hearing, an interlocutory injunction" is manifestly an appeal from the expedited hearing had before the court consisting of three judges. We find no expression of or implication anywhere in the section justifying the assumption that there was an intention on the part of Congress that the single justice or judge to whom the application for the interlocutory injunction should be presented need not call to his assistance two other judges to pass upon the application, in the event that he was of opinion that the claim of the unconstitutionality of the statute was untenable. On the contrary, the statute evidences the purpose of Congress that the application for the interlocutory injunction should be heard before the enlarged court, whether the claim of unconstitutionality be or be not meritorious, as the appeal allowed to this court is from an order denying as well as from an order granting an injunction.

Congress having declared that the merits of the application for an interlocutory injunction, such as that applied for in the case with which we are concerned, should be considered and determined by a tribunal consisting of three judges constituted as provided in the act, it results that a tribunal not so constituted did not possess jurisdiction over the subject-matter of the right to such injunction. It follows, therefore, that in hearing and determining the application for the temporary injunction the single judge

acted without jurisdiction, and that the order entered by him on March 6, 1911, vacating the restraining order theretofore issued and denying the application for an injunction was void. This being the case, it necessarily follows that mandamus is the proper remedy, since the section made no provision for an appeal from an order made by a single judge denying an interlocutory injunction, and a right of appeal is not otherwise given by statute. *Ex parte Harding*, 219 U. S. 363. While these considerations dispose of the case, we briefly advert to an insistence made in argument that we should now take jurisdiction of the merits of the case as made in the Circuit Court and determine whether or not the bill stated a case entitling to relief. Not being vested with original jurisdiction to pass upon the question of the validity of the Kansas statute, and the petitioner being entitled as of right to have the controversy as to the constitutionality of the statute presented by its bill of complaint passed upon by a tribunal having such original jurisdiction, it follows that we do not possess a discretion to grant or refuse the writ, dependent upon our conception as to whether the Kansas statute is or is not constitutional.

The rule issued on April 10, 1911, must be made absolute, and an order will be entered that a writ of mandamus issue directing the Honorable Smith McPherson, as acting circuit judge of the United States for the District of Kansas, and the Circuit Court of the United States for the District of Kansas, to annul and set aside the order of March 6, 1911, vacating the restraining order theretofore issued on February 8, 1911, and denying the application for injunction, and that said judge or such other judge of the said Circuit Court as may hear and determine the application for an interlocutory injunction call to his assistance two other judges, as provided by § 17 of chapter 309 of the act of Congress approved June 18, 1910.

Rule to show cause made absolute.